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No.

Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY B. KEENER, *et al.*,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

HOWARD DENNIS, *et al.*,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, *et al.*,
Respondents.

STANLEY WILMES, *et al.*,
Petitioners,

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William F. Mulroney*
Peter J. Vangsnes
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Counsel for Petitioners

*Counsel of Record

January 15, 1987

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 20036 • 223-1220

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QUESTIONS PRESENTED

1. Whether the Longshore and Harbor Workers' Compensation Act Amendments of 1984 apply to District of Columbia cases governed by the Longshore and Harbor Workers' Compensation Act, either because the Longshore Act continues to apply in full force in the District of Columbia to the class of cases it governs, or by operation of the federal general savings statute, 1 U.S.C. § 109 (1982) (as determined by the Benefits Review Board and the United States Department of Labor) or whether, as held by the District of Columbia Circuit and the District of Columbia Court of Appeals, the general savings statute fails to preserve that portion of the 1928 Act which makes applicable all subsequent congressional amendments to the Longshore and Harbor Workers' Compensation Act.

2. Whether this case presents an issue of local law, concerning which the federal courts must show due deference to the decisions of the District of Columbia Court of Appeals, and, if so, whether this Court's decision in *Washington Metropolitan Area Transit Authority v. Johnson,* 467 U.S. 925 (1984) should be reconsidered either in light of its failure to show such deference to *DiNicola v. George Hyman Construction Co.,* 407 A.2d 670 (D.C. 1979), or in light of Johnson's internal inconsistencies and its legislative reversal by Congress.

3. Whether the *Johnson* holding has the novel legal effect, as held by the Court of Appeals, of conclusively establishing that the Washington Metropolitan Area Transit Authority is, as a matter of law, a "contractor" in all subsequent litigation brought by non-parties to the *Johnson* case, even where the record is entirely different.

LIST OF PARTIES APPEARING BELOW

The plaintiffs below were:

Roy B. Keener and Shirley Keener; Russell E. Turner and Lynn Turner; Peter A. St.-Cyr and Lois St.-Cyr; John J. Jackson and Bernadine Jackson; Freddy L. Williamson and Dorthea Williamson; Glen Lunderg and Theresa Lundberg; Kenneth Haney and Arlene Haney; Alonzo Coward and Mary Coward; Randolph Petty and Doris K. Petty; Robert Barner and Helen Barner; Douglas Dragoo and Lou Ann Dragoo; Ernest Gilmore and Fannie Gilmore; John Hightower and Mary Hightower; Samuel Fleming and Annie Fleming; Everett D. Casey and Donna Casey; William Polk and Marlene Polk; Vincent Thomasson and Olive Thomasson; Charles D'Jossou and Gertrude D'Jossou; Rufus Michael Davis and Karen Davis; Howard Dennis and Debra Dennis; Willard Riley; Enoch Hanks; Roland Cheek and Patricia Cheek; Walter Norberg and Marlene Norberg; Lester Dumond; Edward Few; David Lee Davis and Barbara Davis; Vernon McAbier and Alice McAbier; Ray Bright and Rita Bright; Lloyd Fuller and Avis Fuller; Matthew Carolan and Florence Carolan; Herchal D. Wilson and Virginia Wilson; Robert L. Moody and Barbara Moody; James Coleman; William Lawson and Marie Lawson; John Savoy; James Anderson; George Lynch, Jr.; Walter Hughes; Theodore Robinson and Rebecca Robinson; Robert P[illegible]son and Avonne Peterson; Charles E. Brown and Janice Brown; William R. Smith; Ben Hudson and Patricia Hudson; Gregory F. Soter and Amelia Soter; David Wallace and Doris Wallace; Steen S. Dragoo and Louann Dragoo; George Welsh and Sandra Welsh; Charles D. Maney and Alda Marie Maney; Larry Mateer and Edna Mateer; Vernon Bliss and Lillian Bliss; Kenneth W. Welsh; Dewey Thompson and Laura Thompson; William McAbier; Luther Thompson and Daisey Lee; Albert Vinchairello and Amilia Vinchairello; Bobbie Earl Rogers and Jackie Rogers; John Harber and Patricia K. Harber; Richard Gentry and Eleanor Gentry; William Bailey; Foster Huffman; Edwin Radcliffe and Sharon Radcliffe; George Johnson and

Catherine Johnson; George McCullough and Ella McCullough; Frank Royal and Mary Royal; Charles R. Pryor and Louise Pryor; Paul E. Soots and Ruby Soots; Clyde Burnett and Mamie Burnett; Bragg H. Jones and Barbara Jones; Herbert D. Robery; James O. Connor; Wayne N. Patro and Linda Patro; Edward J. Hyatt; Willie Ed Brown and Vivian Brown; Allen Marr and Dorothy Marr; Harold Suttles and Wanda Suttles; Roosevelt Edmonds and Betty Edmonds; James Lyons; Glade Jacobson; William D. McMillian and Donna McMillian; Dennis M. Wilson and Rose Wilson; Thomas Combs, *et ux.;* Michael R. Hendricks and Gloria Hendricks; Glenwood Williams; Charles Bryant and Bessie Bryant; Stanley Wilmes; Calvin Walker and Rena Walker; Howard Eighmey, *et ux.;* James Buchanan and Shirley Buchanan; John Clanagan; Paul Johnson;

The defendants below were:

Washington Metropolitan Area Transit Authority; Gordon H. Ball, Inc.; S.A. Healy Company; Granite Constructin Company; Fruin-Colnon Contracting Company; McLean-Grove-Skanska, a joint venture; Morrison-Knudsen Contractors, Carson & Gruman Company; Dillingham Heavy Construction Company; Dravo Corporation; Gates & Fox Construction Company; George Hyman Construction Company; Greenfield Construction Company; Horn Construction Company; James McHugh Construction Company; J.F. Shea Construction Company; Keystone Steel, Inc.; McLean, Grove & Co., Inc.; Mergentime Corp.; Metro Track Construction Co.; Morrison-Knudsen; Perini Construction Co.; Peter Kiewit Sons, Co., Inc.; Railco Multi Construction, Inc.; S.A. Healy Co.; S&M Constructors, Inc.; Slattery Associates; Spencer, White & Prentis, Inc.; Traylor Bros., Inc.; Underground Construction Co.; Volpe Construction Co., Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Roy B. Keener, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this matter.

OPINIONS BELOW

The United States District Court for the District of Columbia dismissed the majority of these consolidated cases against the Washington Metropolitan Area Transit Authority in an unreported opinion, *"In re: Metro Subway Accident Referral,"* Misc. No. 82-306 (D.D.C. Dec. 18, 1984), (Appendix C). On appeal those cases were consolidated under the caption *Keener, et al. v. Washington Metropolitan Area Transit Authority,* Nos. 85-5029, *et al.* The District Court also granted summary judgment to intermediate contractor defendants in an unreported opinion, *In re: Metro Accident Referral,* Misc. No. 82-306 (D.D.C. Sept. 19, 1984) (Appendix D). These appeals were captioned *Dennis v. Washington Metropolitan Area Transit Authority,* Nos. 85-5122 and 85-5123 in the Court of Appeals. The District Court's order dismissing those cases captioned in the Court of Appeals as *Wilmes v. Bechtel Civil and Minerals, Inc.* is also unreported (Appendix F). The Court of Appeals below affirmed these decisions in *Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173 (D.C. Cir. 1986) (Appendix A). A Petition for Rehearing and/or Suggestion for Rehearing En Banc was denied on October 17, 1986 (Appendix B).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The decision of the Court below issued on September 2, 1986. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed, and was denied on October 17, 1986 (Appendix B).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

The District of Columbia Code (1973):

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act Made Applicable to the District of Columbia.

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

1 U.S.C. § 109 (1982) provides in pertinent part:

> The repeal of any statute shall not have effect to release any penalty, forfeiture, or liability incurred under such statute . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Section 46 of the District of Columbia Workers' Compensation Act of 1979, 27 D.C. Reg. 2503, 2541, provides:

> An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code Sec. 36-501, 503) is hereby repealed.

Section 1-206 of the District of Columbia Self-Government Act, D.C. Code §§ 1-201 *et seq.* (1981), provides:

> § 1-206. Congressional Reservation of Authority.
>
> Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (Sept. 28, 1984) provide in pertinent part:

Liability For Compensation

Sec. 4(a). Section 4(a) is amended to read as follows:

"Sec. 4.(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

(b) Section 5(a) is amended by adding at the end thereof the following new sentence: "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 4."

STATEMENT OF THE CASE

A. Introduction.

These consolidated cases pose three issues. The first issue is whether the Longshore and Harbor Workers' Compensation Act Amendments of 1984 ("1984 Longshore Amendments") Pub. L. No. 98-426 (1984) apply to local District of Columbia cases governed by the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*[1] This issue is a pure question of law involving an analysis of the LHWCA, the 1984 Longshore Amendments, the 1928 Act, and a fourth federal statute, the general savings statute, 1 U.S.C. § 109.

The second issue, also a pure question of law, concerns this Court's longstanding deference to decisions of the highest court of the District of Columbia on questions involving statutes of purely local application. This petition asks the Court to reconsider the *Johnson* decision in light of this principle.

The third issue is a question of fact and law. The issue is whether the courts below properly applied principles of summary judgment in determining that the Washington Metropolitan Area Transit Authority ("WMATA") is a contractor under Section 904 of the LHWCA. The meaning of the term contractor under Section 904 has been addressed in a previous case by the United States Court of Appeals for the District of Columbia Circuit, but was not addressed by the courts below, and has never been addressed by this Court. The facts pertinent to this issue are discussed in the following section.

B. Facts Material To The Questions Presented.

All of the cases before the Court are tort claims against WMATA and/or construction contractors hired by WMATA to build the Metro subway system. Most of the suits allege serious lung disease as a result of improper or inadequate safety practices by the defendants.[2]

The facts of this case are undisputed, with the exception of the facts relating to WMATA's purported status as a "contractor" under Section 904 of the Longshore Act. In response to the District Court's Show Cause Order and in support of their own motion for partial summary judgment, plaintiffs incorporated

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[1]The LHWCA was extended to local District of Columbia cases by the District of Columbia Worker's Compensation Act ("1928 Act"), 36 D.C. Code § 501 *et seq.* (1973).

[2]This Court decided seven such claims in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 928 (1984) (*"Johnson"*). These cases now before the Court in *Wilmes v. Washington Metropolitan Area Transit Authority.*

many exhibits obtained during discovery.[3] These documents related primarily to the construction contracts entered into between WMATA and the construction contractors hired to build the Metro system.

In none of the documents submitted was WMATA referred to as a contractor. The companies with whom WMATA contracted were referred to as contractors, and not as subcontractors.

Plaintiffs also submitted an affidavit from an expert in construction practices who was personally involved with the building of the Metro system (Appendix I). No such affidavit was in the record before the lower courts or this Court in *Johnson*. This affidavit provided factual evidence that WMATA has never had the responsibility, and has never exerted the type or amount of control over construction, associated with contractors. The affidavit provided evidence that WMATA is not as "contractor," but an "owner."

WMATA submitted no evidence relating to its purported status as a contractor.

C. The Petitioners' Actions In The District Court.

Petitioners' actions against the respondents are based on complaints either filed in the United States District Court for the District of Columbia or filed in the Superior Court of the District of Columbia and removed to the District Court. Jurisdiction in the District Court existed pursuant to D.C. Code § 1-2431(81) (1981), which vests original jurisdiction in the United States District Court of all actions brought by or against WMATA. In many of the cases, jurisdiction also existed independently pursuant to diversity of citizenship. 28 U.S.C. § 1332(a)(1) (1981).

[3]The documents submitted were those originally submitted to the District Court in response to WMATA's Motion for Summary Judgment in *Turner v. Bechtel Associates Professional Corporation, D.C., et al.*, No. 81-2389. *Turner* is one of the cases before the Court in this petition. Similar documents were included in the record in *Johnson*.

These petitioners' actions were stayed on December 23, 1982 by the United States District Court for the District of Columbia pending the final resolution of *Johnson v. Bechtel Associates Professional Corp.*, 717 F.2d 574 (1983), *rev'd sub nom. Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S.C. 928 (1984).[4] Following this Court's *Johnson* decision, the District Court issued a show cause order on July 31, 1984 directing these petitioners to show cause why their causes of action should not be dismissed (Appendix H). Petitioners filed a response on August 31, 1984, along with a motion for partial summary judgment on the issue of WMATA's status as a "contractor."

On September 19, 1984, the District Court dismissed all defendants in the vertical chain above the petitioners' employer[5] but below WMATA, holding that the Johnson case mandated a rule of vertical immunity.[6] (Appendix D).

D. The 1984 Longshore Amendments.

Before the District Court ruled on the Show Cause Order with regard to WMATA, President Reagan signed into law the 1984 Longshore Amendments, which in part legislatively reversed

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[4]The one exception is the consolidated case of *Wilmes v. Washington Metropolitan Area Transit Authority*, the original *Johnson* cases. Pursuant to *Johnson's* holding, a supplemental judgment was issued by the Court of Appeals, and judgments dismissing the cases were entered by the District Court on September 21, 1984. *See Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 413-414 (D.C. Cir. 1986). Appeals were taken on October 12, 1984 pursuant to the Longshore and Harbor Workers' Compensation Amendments of 1984, Pub. L. No. 98-426 § 28(a), 98 Stat. 1639 (effective September 28, 1984) 801 F.2d at 414-15.

[5]Pursuant to *Johnson*, 467 U.S. 928, 940, n.14, the petitioners voluntarily dismissed their causes of action against their employers, actions which had been erroneously mandated by the District Court's decision in *Clanagan v. Washington Metropolitan Area Transit Authority*, 558 F.2d 209, 212 (D.C. D.C. 1982).

[6]Many WMATA construction contracts involved a series of subcontracts and sub-subcontracts.

Johnson's holding. Section 4(a) of the LHWCA was amended to read as follows:

> "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor."

Section 5(a) was also amended by the addition of the following sentence:

> "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4."[7]

Explaining these legislative amendments, the Committee of the House and Senate Conference stated:

> "Third, the substitute addresses that issue of immunity in the situation where an employee of a subcontractor brings a third party action against the contractor for a work-related injury. The Supreme Court in *Washington Metropolitan Area Transit Authority v. Johnson,* 104 S.Ct. 2827 (1984), changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability and immunity under the Longshoremen's and Harbor Workers' Compensation Act.
>
> The Conference substitute, in disapproving *WMATA v. Johnson,* achieves the following: First, the obligation of the contractor to secure compensation for the employee of the subcontractor is a con-

[7]Pub. L. No. 98-426, 98 Stat. 1639, Section 4(a), (b) 1984.

> tingent one, which is triggered only upon the failure of the subcontractor to secure compensation for its own employees. Second, the contractor remains amenable to suit by its subcontractors' employees in those instances where the subcontractor-employer has fulfilled its statutory obligation to secure compensation for its employees. Third, however, where the subcontractor defaults in securing compensation, thus triggering the contractor's obligation, and the latter fulfills that obligation, the contractor is deemed an "employer" for purposes of section 5(a) and therefore entitled to immunity from suit by the subcontractor's employees. Fourth, if the contractor utilizes a "wrap-up" insurance policy to provide insurance coverage for the benefit for satisfying the subcontractor's primary obligation to secure compensation, the contractor still remains amenable to suit by employees of the subcontractor; the contractor does not enjoy the immunity afforded by Section 5(a) of the Act.

H.R. Rep. No. 98-1027, 98th Cong., 2d Sess., at 24 (1984).

E. In Re: Metro Subway Accident Referral.

Despite the legislative action overruling *Johnson*, the District Court, in its order of December 18, 1984, held that the congressional legislation did not affect those cases governed by the LHWCA by virtue of the 1928 Act, as that law had been superseded by the District of Columbia Workers' Compensation Act of 1979 ("New Act") for injuries occurring after July 24, 1982.[8] Since the New Act contained a repealer of the 1928 Act, the Court reasoned that only the vehicle of the general savings statute preserved the 1928 Act, and the savings statute failed to preserve that portion of the 1928 Act that made applicable "all amendments that may hereafter be made" to the LHWCA. The

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[8]D.C. Code § 36-301 *et seq.* (1984); *Garrett v. Washington Air Compressor Co., Inc.*, 466 A.2d 462, n.1 (D.C. 1983); *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1103, n.2 (D.C. 1983).

District Court likened the status of the 1928 Act to that of "suspended animation," and concluded that the *Johnson* decision remained binding on 1928 Act claims despite the amendments to the same statute interpreted by this Court (Appendix C, 31a, n. 14). The District Court dismissed the actions against WMATA, and the plaintiffs appealed.

F. Intervening Decisions And Regulations During Pendancy Of The Appeals.

While the appeals were pending, four significant events occurred. First, in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied*, ____ U.S. ____, 106 S.Ct. 1378 (1986), the District of Columbia Court of Appeals, on July 5, 1985, agreed with the District Court's conclusion that the 1984 Longshore Amendments do not apply to cases governed by the LHWCA by virtue of the 1928 Act. Second, on February 3, 1986, the United States Department of Labor issued regulations inconsistent with *O'Connell*, stating that the 1984 Longshore Amendments are indeed applicable to compensation claims that continue to be governed by the LHWCA pursuant to the 1928 Act.[9] Third, in *Gardner v. Railco Multi Construction Co., et al.*, 18 Ben. Rev. Bd. Serv. 264 (June 11, 1986), the Benefits Review Board of the United States Department of Labor independently concluded that the general savings statute preserved the 1928 Act in its entirety, including the clause making applicable subsequent amendments, and that the 1984 Longshore Amendments therefore do apply to 1928 Act compensation claims. Finally, on June 24, 1986, the District of Columbia Circuit held in *Hall v. C&P Telephone Co.*, 793 F.2d 1354 (D.C. Cir. 1986) that it would defer to decisions of the District of Columbia Court of Appeals on issues involving interpretations of the LHWCA in District of Columbia cases because of the local nature of the 1928 Act. 793 F.2d at 1358.

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[9]51 Fed. Reg. 4270 (Feb. 3, 1986), codified at 20 C.F.R. 701.101(b) (1986).

G. The Court of Appeals' Decision.

On September 2, 1986, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgments of the United States District Court, deferring to the *O'Connell* court's conclusion pursuant to the policy of deference it had recently announced in *Hall. Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173 (D.C. Cir. 1986). The court below found that it would give *O'Connell* due deference, and that therefore the 1984 Longshore Amendments do not apply to these petitioners' claims. The court also held that *Johnson* was dispositive not only on the issue of WMATA's status as a "contractor" in the *Johnson* case itself, but also with regard to WMATA's status as a contractor on the different record in this case.

REASONS FOR GRANTING THE PETITION

I.

Applicability Of The 1984 Longshore Amendments

This Court held in *Johnson* that contractors are entitled to the immunity from suit explicitly granted only to employers by Section 905 of the LHWCA. About three months later, Congress enacted a series of amendments to many provisions of the LHWCA, including changes to Sections 904 and 905. Congress made the amendments to Sections 904 and 905 applicable to all pending cases, in order to ensure that *Johnson* ". . . should not have any precedential effect." H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. at 24 (1984).

Under the Court of Appeals' holding in this case, Congress' legislative reversal of *Johnson* would apply everywhere that the LHWCA applies *except* in the jurisdiction where *Johnson* arose, despite Congress' unquestionable desire to completely undo what was done by *Johnson.*

This anomaly is, in and of itself, a sufficient basis for granting this petition. There exist, however, even more important

reasons why the petition should be granted. The LHWCA continues to apply, and will apply for many years to come, to all injuries occurring prior to the effective date of the New Act.[10] Under the Court of Appeals' holding, the inevitable future amendments to the LHWCA[11] will apply to District of Columbia cases only if Congress passes special legislation to *re-enact* the 1928 Act. Neither City Council, in repealing the 1928 Act, nor Congress, in approving the repeal, could possibly have wanted to require such extraordinary action merely to enable Congress to ensure that the LHWCA applies on a consistent basis countrywide.

In addition, the Court of Appeals' decision will force the federal courts and the United States Department of Labor[12] to administer two different versions of the LHWCA, the amended version in longshore cases and under every other extension of the LHWCA,[13] and the old version in District of Columbia cases. Again, such inconvenience and burden cannot have been intended.

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[10]Because the LHWCA provides for lifetime benefits, an eighteen year old District of Columbia worker who was injured in 1981, and who suffers from a permanent wage loss, will still be receiving benefits in 2031 if he lives to age 68.

[11]The LHWCA has been amended extensively four times since 1928.

[12]Although the New Act is administered by an agency of the District of Columbia government, pre-New Act cases continue to be administered by the United States Department of Labor.

[13]The LHWCA is also applicable to (a) employees on defense bases (Act of Aug. 16, 1941, ch. 357, § 1651-1654); (b) employees of nonappropriated fund instrumentalities, such as post exchanges (Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8151-8173)); (c) employees of government contractors injured overseas by war-risk hazards (Act of Dec. 2, 1942, ch. 668, Title I, § 102, 56 Stat. 1031 (codified as amended at 42 U.S.C. § 1702)); and (d) workers on oil drilling rigs on the outer continental shelf (Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c)).

These anomalous results establish that this case presents special and important federal issues meriting the Court's review. The following discussion will show further why the petition should be granted.

A. These Cases Are Governed By The LHWCA Itself, And The 1984 Longshore Amendments Therefore Apply In The District of Columbia.

The Court of Appeals' decision that the 1984 Longshore Amendments are not applicable to these cases is premised on the notion that the repeal of the 1928 Act "divorced the local workers' compensation system completely' from the LHWCA.[14]

This premise is based on a fundamental misconception about the relationship between the LHWCA and the 1928 Act. Contrary to the conclusion of the *O'Connell* court, and the apparent conclusion of the Court of Appeals, the 1928 Act did not merely "borrow," or "incorporate by reference," the provisions of the LHWCA. Instead, the 1928 Act was simply the enactment that made the LHWCA the applicable compensation law of the District and which circumscribed its jurisdictional scope.

The proposition that the LHWCA itself governs these cases has been central to the administration and adjudication of District claims for more than fifty years. This Court recognized this distinction in *Del Vecchio v. Bowers,* 296 U.S. 280, 285 (1935). The respondent in *Del Vecchio* argued that the Court shuld not grant certiorari because the 1928 Act is a local law, and that the case therefore did not present a federal issue. The Court rejected this contention, holding that the case was governed by the LHWCA itself, and presented a question of interpretation of the federal law.

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[14]This is precisely the language used by the District of Columbia Court of Appeals in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985), *cert. denied,* ____ U.S. ____, 106 S.Ct. 1378 (1986). The Court of Appeals deferred to *O'Connell* and adopted its analysis. *Keener,* 800 F.2d at 1178.

The Court stated:

> In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. *Del Vecchio,* 296 U.S. at 285.

This Court implicitly followed *Del Vecchio* in the *Johnson* decision. On questions involving interpretation of statutes of purely local application (such as the 1928 Act) this Court considers itself bound by decisions of the District of Columbia Court of Appeals unless "egregious error has been committed." *Pernell v. Southall Realty,* 416 U.S. 363, 368-69 (1974). Had this Court considered that *Johnson* presented a question of interpretation of the 1928 Act (which would be the case if the 1928 Act merely incorporated the LHWCA by reference) this Court would undoubtedly have deferred to the District of Columbia Court of Appeals' decision in *DiNicola v. George Hyman Construction Co.,* 407 A.2d 670 (D.C. 1979). *DiNicola* had held that contractors are *not* entitled to immunity under the LHWCA. Instead, this Court treated the issue as involving the LHWCA itself, and gave *DiNicola* no deference at all.[15]

This distinction is also reflected in the title of the first section of the 1928 Act and in the text of the section:

> Section 1. *Longshoremen's and Harbor Workers' Compensation Act made applicable to District of Columbia.*

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[15]The principle of deference expressed in *Pernell* is discussed further in Section II. As we argue therein, if this case is merely a "1928 Act case," this court erred in *Johnson* when it failed to defer to *DiNicola,* and should therefore reconsider its holding in that case.

> *The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply* in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or the death occurs . . . District of Columbia Code, § 36-501 (1973) (emphasis added).

The legislative history of the 1928 Act also shows that it is the LHWCA itself that governs these cases:

> This bill (S.3565) extends to private employments in the District the protection of the Federal Longshoremen's Act of 1927, which has been in successful operation for nearly a year to the mutual satisfaction of both employers and employees. We urge its adoption as a just and reasonable compensation provision for the District of Columbia. S. Rep. No. 852, 70th Cong., 1st Sess. at 2 (1928).

The question of whether the 1928 merely "incorporated by reference" the provisions of the LHWCA or whether it actually made the LHWCA itself the applicable compensation law in the District of Columbia is crucial to an understanding of the effect of the repeal of the 1928 Act, and is therefore important in resolving the issue of the applicability of the 1984 Longshore Amendments.

If the 1928 Act incorporates the LHWCA by reference, as the Court of Appeals apparently concluded, then the repeal of the 1928 Act means that *no statute* covers claims arising prior to the effective date of the New Act. Under this theory, employers and employees maintain their rights and duties ony by virtue of the general savings statute, 1 U.S.C. § 109 (1982). (See discussion in Section I, B, below.)

If the LHWCA itself is extended to the District by the 1928 Act, as text and history of the 1928 Act and this Court's decisions establish, then the effect of the repeal was simply to ensure that the LHWCA would not be applicable to new cases. The

LHWCA therefore continues to apply with full force to the class of cases that it continues to govern, and the 1984 Longshore Amendments apply automatically to all District of Columbia cases governed by the LHWCA.

B. The Only Rational Interpretation Of The General Savings Statute Is That It Preserves The Provision Of The 1928 Act Making Subsequent Amendments Applicable.

The Court of Appeals concluded that pre-New Act claims continue to be governed by the standards of the LHWCA solely by the application of the general savings statute, 1 U.S.C. § 109 (1982). The Court of Appeals then concluded, without any analysis of the statute or this Court's decisions interpreting it, that the savings statute does not preserve the clause of the 1928 Act making all subsequent amendments to the LHWCA applicable in the District.[16]

The parties agree that, in enacting a new compensation law for the District and repealing the 1928 Act, the City Council of the District of Columbia and Congress[17] intended that the new law apply only to injuries occuring after the effective date of the New Act. If City Council and Congress intended that the LHWCA continue to govern cases such as these only by virtue of the general savings statute (there is no evidence that either body so intended), the courts should give careful consideration to the question of *what is preserved.*[18]

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[16]The *O'Connell* court reached the same conclusion, also without any analysis of the savings statute or this Court's decisions interpreting it. *O'Connell,* 495 A.2d at 1141-42.

[17]Congress reviews every Act passed by City Council, and may prevent any enactment from taking effect if it deems appropriate. District of Columbia Code, § 1-233(c)(1)(2) (1981).

[18]In interpreting the savings statute, it must be kept in mind that although the savings provision has been applied to civil cases, it was originally enacted to abolish the common law presumption that the repeal of a criminal statute resulted in the abatement of criminal prosecutions. *Warden v. Marrero,* 417 U.S. 653, 660-61 (1974). Obvious-

The most relevant case concerning the general savings statute's applicability in this context is *De La Rama Steamship Co. v. United States,* 344 U.S. 386 (1953). The petitioner, De La Rama Steamship Co., filed a suit on December 22, 1944 in the United States District Court against the United States, seeking to recover its loss of the M.V. Doña Aurora, a ship that was sunk by enemy action on December 25, 1942 during World War II. While suit was pending, Congress, in 1947, repealed the War Risk Insurance Act, upon which the suit was based. At the trial of the action, the Government first raised the defense of lack of subject matter jurisdiction. The District Court denied the motion, but the United States Court of Appeals for the Second Circuit reversed, holding that jurisdiction was extinguished by the 1947 repeal, and that the only proper tribunal for the action was the United States Court of Claims. The Court of Appeals held that the repeal destroyed the jurisdiction of the court, but that it did not affect substantive rights and liabilities because the savings statute preserved such rights and liabilities.

This Court reversed the decision of the Court of Appeals and in so doing set forth the legal standards that are dispositive in this case:

> This brings us to the crux of the contention which prevailed below, namely, that while the Government's obligation as an insurer, which came into being with the sinking of the Doña Aurora on December 25, 1942, survived the repeal of the War Risk Insurance Act by the Joint Resolution of 1947, the "liability" could be enforced only in the Court of Claims, not in the District Court. This conclusion is no more substantial than the tenuous bits of legal reasoning on which it is compounded.

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ly, the statute was not designed to govern the continuing application, over many years, of comprehensive statutory schemes such as workers' compensation statutes, and its language is poorly suited to analysis of issues such as the issue in this case. One would not expect Congress to have a desire to amend an abolished criminal statute, since these are no *future* rights and liabilities to be adjusted.

> By the General Savings Statute *Congress did not merely save from extinction a liability incurred under the repealed statute; it saved the statute itself:*
>
> "and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability."
>
> We see no reason why a careful provision of Congress, keeping a repealed statute alive for a precise purpose, should not be respected when doing so will attain exactly that purpose.
>
> 344 U.S. at 389 (emphasis added).

Since the 1928 Act "shall be treated as still remaining in force" one must consider what is being saved. The savings statute *does not* save the LHWCA, either in its current form or its form at the time of the repeal of the 1928 Act. It saves the 1928 Act, including its provision that makes the LHWCA *and all subsequent amendments thereto* applicable in the District. To make the savings statute effective for some purposes and ineffective for others completely runs afoul of the purposes of the general savings statute, and interferes as well with the only conceivable intent of Congress and City Council.[19]

There is nothing in either the language of the savings statute or the reasoning of this Court in *De La Rama* that would prevent the savings statute from saving that portion of the 1928 Act that makes future amendments to the LHWCA applicable in the District.[20] The Court of Appeals concluded, however, that the

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[19]As we noted in Section I, A, it is difficult to believe that either City Council or Congress could have intended that claimants' with ongoing claims be locked into a version of the LHWCA that Congress has since amended once and, based on the historical frequency of amendments to the LHWCA, will probably amend two or three more times over the next fifty years.

[20]This rationale was the basis for the Benefits Review Board's holding that the 1984 Longshore Amendments are applicable to 1928 Act claims. *Gardner v. Railco Multi Construction Co.*, 18 Ben. Rev. Bd. Serv. 264, 271-72 (June 11, 1986).

savings statute preserved only the version of the LHWCA in effect at the time of repeal of the 1928 Act, apparently relying on the language of the savings statute preserving "incurred" rights and liabilities. The question then becomes what future rights and liabilities are "incurred" as of the date of the relevant employment event. The answer is that *all* future rights and liabilities, while contingent on future events, are incurred as of that date. Rights and liabilities are contingent on a variety of factors, including *changes* in medical condition, *changes* in economic status, *and changes in the law.* The fact that changes in the law are to be expected in the setting of a comprehensive statutory scheme governing the rights of employers, employees and third parties over a period of many years is reflected in the language of the 1928 Act, which anticipates the need for changes in the LHWCA. WMATA's liability to Roy B. Keener for negligence was no less "incurred" as of July 26, 1982, and was no more contingent on future events than were his employer's responsibility for medical and compensation payments hinging on changes in his medical condition which had not yet occurred.[21]

There is simply no rational basis for saving the employers' liability for (and the employees' right to) compensation based on future events, and *not* saving rights and liabilities based on changes in the law. This is particularly so where the statute being saved *specifically* provides that future changes in the law are applicable.

In order to determine whether the rights and liabilities in question here are saved, one must consider what savings statutes are for, and what they are intended to do. Congress wanted to make sure that repeals of criminal statutes were prospective only

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[21]The United States Department of Labor's final regulations implementing the 1984 Longshore Amendments expressly make the amendments applicable to 1928 Act claims, and DOL gives a full, detailed explanation in support of its implementation regulation. 51 Fed. Reg. 4270-72 (Feb. 3, 1986), codified at 20 C.F.R. 701.101(b) (1986).

in effect. But with regard to criminal cases based on *acts* prior to the repeal, the "statute shall be treated as still remaining in force." By the same token, if the 1928 Act is to be treated as "still remaining in force" as to acts (injuries) prior to the repeal, then the 1928 Act's provision making the LHWCA (and all subsequent amendments) applicable must be given effect. If these cases are governed by the "saved" provisions of the 1928 Act, then the LHWCA, *as amended,* is the governing substantive law of this case.[22]

Because the general savings statute is a federal statute of nationwide application, and because the Court of Appeals' decision is in direct conflict with the interpretation of the Benefits Review Board and the United States Department of Labor, its interpretation presents an important issue of federal law. This Court has not interpreted the saving statute in a context similar to this one since its *De La Rama* decision in 1953. The Court should grant the petition to consider whether the Court of Appeals has interpreted the savings statute consistent with its plain language and with this Court's prior decisions.

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[22]The Court of Appeal's decision below also is contrary to the Congressional reservation of authority contained in Section 1-206 of the District of Columbia Self-Government Act, D.C. Code §§ 1-201 *et seq.* (1981). Section 1-206 provides:

> "Notwithstanding any other provision of this Act, *the Congress of the United States reserves the right, at any time,* to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation *to amend* or repeal *any law in force in the District prior to or after enactment of this Act* and any act passed by the Council." (emphasis added)

It obviously subverts the plain language of this statutory provision to hold, as the Court below did, that the 1984 Longshore Amendments are incapable of affecting the application of the LHWCA's substantive provisions for 1928 Act claims.

II.

Johnson Should Be Reconsidered

A. If The Court of Appeals Was Correct That This Case Presents A Matter Of Local Law, This Court Should Reconsider The *Johnson* Decision.

If the lower court was correct in its characterization of the 1928 Act, this case raises significant issues regarding the relationship between the federal courts, including this Court, and the courts of the District of Columbia. In the court below, these petitioners argued that their claims were governed by the federal LHWCA, and that their right to claim damages from third parties was restored by the 1984 Amendments overruling *Johnson*. The Court of Appeals rejected this view, instead adopting the view taken in *O'Connell,* which held that these claims arose under the 1928 Act, and were local matters to be resolved by the District of Columbia Court of Appeals. 800 F.2d at 1177-78. In so holding, the *Keener* panel applied the rule announced in *Hall v. C&P Telephone Co.*, 793 F.2d 1354 (D.C. Cir. 1986), which recognized the 1928 Act as "local" law to which it would apply *Erie*[23] principles.

Accepting this reasoning puts this case at odds with the *Johnson* decision. Although *Johnson* was a "1928 Act case," this Court did not consider deferring to the District of Columbia Court of Appeals' decision in *DiNicola v. George Hyman Construction Co.*, 407 A.2d 670 (D.C. 1979). If *Keener* is correct, this Court should reevaluate its basis for granting certiorari in *Johnson,* and its decision to in effect overrule *DiNicola.*

In *Pernell v. Southall Realty,* 416 U.S. 363 (1974), this Court held that under the Court Reform Act of 1970, Pub. Law 91-358, 84 Stat. 552 (1970):

> "the decisions of the District of Columbia Court of Appeals on matters of local law – both common law and statutory law – will be treated by this court in a

[23] *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938)

> manner similar to the way in which we treat decisions of the highest court of a state on matters of state law.

416 U.S. at 368. Plainly, if 1928 Act cases present issues of local law, then this Court erred in *Johnson* by failing to defer to *DiNicola,* which held that contractors are not entitled to immunity in cases under the 1928 Act.[24]

Put simply, respondents cannot have it both ways. If on one hand this case is governed by the LHWCA, as argued by petitioners below, the 1984 Amendments apply and *Johnson* decision has been legislatively overruled. If on the other hand this case is governed by local law, as was held below, this Court's *Johnson* decision has been undermined by this Court's failure to defer to the *DiNicola* rule.[25] Any other result would destroy the quasi-Federal-state relationship which has been established between the federal courts and the courts of the District as a result of the Court Reform Act of 1970 and the *Pernell* holding.

B. Other Reasons For Reconsidering Johnson.

In *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978), this Court indicated that while there was no definitive formula for determining whether a prior precedent

[24]This issue was never directly addressed in the *Johnson* case. WMATA's Brief and Reply sought to distinguish *DiNicola* on the facts of the case and immunity was sought because WMATA "secured" wrap-up insurance coverage, not because it would otherwise be entitled to immunity. WMATA did not directly ask the Court to overrule *DiNicola,* and the parties in *Johnson* therefore did not focus on the role *Erie* and *Pernell* Principles played in the case. Of course, it is a guiding principle of this Court that its decisions are binding only on those issues presented before it *Rogers v. Lodge,* 458 U.S. 613, 628 n. 18(b) (1982)

[25]If this case presents an issue of local law *Johnson* May be "persuasive" only rather than "binding" in the District of Columbia. The District of Columbia Court of Appeals has recently ordered rebriefing for the third time and reargument in the case of *Estep, et al. v. Construction General, Inc.,* App. No. 85-543, a 1928 Act case where that very issue is presented. This is an insight that the *Keener* court overlooked.

will be overturned, there are four factors that the court will generally consider. First, the Court will consider whether the decision in question misconstrued the statute in light of its legislative history. Second, the Court will determine whether overruling the decision will be consistent with more recent expressions of legislative intent. Third, the Court will determine whether the questioned decision constituted a departure from prior precedents. Finally, the Court will determine whether overruling the decision would frustrate any legitimate reliance on its holding. *Id.*, 436 U.S. at 695-701.

Petitioners believe that a fair examination of these factors leads to the conclusion that the Court should now overrule *Johnson*. First, it can in all fairness be said that the Court overlooked relevant legislative history set forth in *DiNicola* that should have precluded the holding in the case. *See* 407 A.2d 670, 673-674, citing H.R. Rep. No. 92, 1441 (1972). The Court would have to seriously question its rationale if presented with the question again. The second factor set forth in *Monell* is easily satisfied, since overruling *Johnson* would be consistent rather than inconsistent with more recent expressions of legislative intent. The third factor involves an examination of whether *Johnson* was a departure from prior judicial interpretations of Sections 904 and 905. It is widely recognized that *Johnson* was in fact such a departure form prior appellate decisions concerning the issue involved[26] and petitioners submit that this factor also weighs in favor of overruling *Johnson*. The

[26] *Johnson* departed from the rationale of every appellate decision on point under the 1928 Act and the LHWCA itself. *See DiNicola v. George Hyman Construction Co., supra; Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967); *Fiore v. Royal Painting Co.*, 398 So.2d 863 (Fla. Dist. Ct. 1981). The decision also departed from the relevant New York cases interpreting the sections on which the LHWCA provisions were based. *See Sweezey v. Arc Electrical Construction Co.*, 295 N.Y. 306, 67 N.E.2d 369 (1946); *Clark v. Monarch Engineering Co.*, 248 N.Y. 107, 161 N.E. 436 (1928). *See also*, Comment, *We Say What We Mean, and We Mean What We Say: The 1984 Amendments to Sections 904 and 905 of the LHWCA*, 46 La. L. Rev. 361, 363-67 (1985).

fourth factor, whether overruling *Johnson* would frustrate any legitimate reliance thereon, weighs in favor of overruling *Johnson*, for two reasons. First, the decision was legislatively overruled some three months after it came down, making it extremely unlikely that anyone could legitimately rely on its holding. In fact, these actions and all actions governed by *Johnson*, arose long before the *Johnson* decision. Secondly, and just as importantly, *Johnson* could not lead to act of reliance by any general contractor, because immunity from suit is given automatically and requires no action of any kind. Thus, overruling *Johnson* could not frustrate any legitimate reliance on the decision.

Moreover, the underlying aims of the *Johnson* court have not been fulfilled. Despite WMATA's claims that failure to give contractors immunity would lead to unnecessary litigation of compensation claims, all to the detriment of injured workers, WMATA's insurance carrier has become ever more litigious in the compensation arena.[27] The case should be overruled.

III The Court of Appeals Failed To Apply The Most Basic Summary Judgment Principles in Affirming the Trial Court Decision That Litigation Concerning WMATA's Purported Status as A Contractor Was Precluded By The *Johnson* Decision.

The issue of whether a contractor is entitled to immunity from suit by employees of subcontractors obviously does not arise, of course, unless the defendant is, as a matter of fact and law, a contractor.[28] As the following discussion will show, the petitioners simply have not been given an opportunity to litigate

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[27]Since *Johnson* was decided in June, 1984, *not one single compensation claimant* with an occupational pulmonary impairment has been paid compensation benefits from Lumberman's Mutual Casualty Company ("LMC") on a voluntary basis. Every such claim filed has been controverted by LMC.

[28]The basis for certiorari in this section applies to the consolidated *Keener* and *Dennis* cases, but not the *Wilmes cases*.

this issue. As the following discussion will show, the courts below have failed to apply the most basic principles of summary judgment. The courts below have, in effect, held the petitioners bound by trial court finding in the *Johnson* case that WMATA is a contractor, without allowing petitioners the opportunity to conduct discovery, without considering the very different record in this case, and without any discussion of applicable case law. The Court should grant certiorari on this issue because, if the decision below is allowed to stand, the District of Columbia Circuit will have in essence applied collateral estoppel against non-parties to prior litigation. Although purporting to apply summary judgment standards, the courts below applied standards completely at odds with the established rules governing summary judgment that have been long recognized by every Circuit and by this Court.

WMATA's purported status as a contractor, on the record in the *Johnson* case, was addressed by this Court in a footnote in the *Johnson* decision. The Court stated: "(b)ecause the lower courts' findings have ample support in the record . . . . we accept their conclusion that WMATA is a general contractor for purposes of § 4(a) of the LHWCA. See *Rogers v. Lodge,* 458 U.S. 613 (1982)." *Johnson,* 467 U.S. at 928, n.5.

Because one's status as a contractor depends both on the facts of the case and on the legal meaning of the term "contractor" in Section 904 of the Longshore Act, the issue is a "mixed question" of fact and law. This Court in *Johnson* did not, however, discuss the legal aspects of this issue. Instead, the Court "accepted" the factual finding (a finding made without any discussion of the legal meaning of the term "contractor") of one trial judge that WMATA was a contractor on the record in that case.

For reasons that are unclear, this Court in *Johnson* did not apply summary judgment standards in addressing the "contractor" issue. Had it done so, it would have considered whether the facts, considered in light most favorable to the non-moving party, compelled judgment as a matter of law. *See, e.g., Anderson v. Liberty Lobby, Inc.,* 477 U.S. ____, 106 S.Ct. 2505, 2514

(1986). Instead, the Court applied the standard of *Rogers v. Lodge*, 458 U.S. 613 (1982), a standard applicable only where the trial court is properly sitting as a fact-finding body pursuant to Rule 52 of the Federal Rules of Civil Procedure. This Court, like the trial court, did not discuss the case law relevant to the "contractor" issue, and did not address whether a jury could reasonably refuse to find WMATA to be a contractor under the appropriate legal standard.[29]

Following this Court's decision in *Johnson*, the trial judge assigned to coordinate the District Court's handling of the consolidated cases not involved in the *Johnson* appeal issued a Show Cause Order directing plaintiffs (petitioners before this Court) to show why the case should not be dismissed (Appendix H). The Court's Order *did not* allow further discovery. Because this Court's decision in *Johnson* clearly did not hold (and could not have held) that WMATA is a contractor, as a matter of law, in cases involving different litigants and involving a potentially different factual record, petitioners opposed dismissal.[30] Because discovery was not allowed, the petitioners could not obtain further evidence on this issue. Petitioners did, however, submit an affidavit by an expert in construction practices familiar with WMATA's role in the construction of the Metro system. The affidavit submitted related *directly* to the legal indicia of "contractor" status, as outlined by the District of Columbia Circuit in *National Van Lines* (Appendix I). Respondents (defendants below) submitted no factual matter whatsoever in support of their opposition, instead merely citing to *Johnson* and the record in *Johnson*.

The trial judge assigned to decide these cases nowhere addressed the contractor issue, instead merely implying that this

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[29]This Court has never addressed the scope of the term "contractor" under Section 904 of the LHWCA. The District of Columbia Circuit did, however, address this issue in *Director, Office of Workers' Compensation Programs v. National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979) *cert. denied*, 448 U.S. 907 (1980).

[30]Plaintiffs also moved for partial summary judgment on this issue.

Court had "disposed of" the issue in *Johnson*. (Appendix C at 24a). The court did not discuss the legal indicia of contractor status, did not discuss the effect of the very different record in this case, and did not discuss how this Court's footnote in *Johnson*, which merely deferred to a trial court "finding," automatically controlled the contractor issue in a different case involving a different record. The judge made no effort to weigh the evidence in the case at all, did not accept the plaintiffs' evidence as true, and did not consider whether, in light of the evidence before him and the appropriate legal standard, judgment was required as a matter of law, all in clear violation of the most basic principles of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ____, 106 S.Ct. 2505 (1986).

The Court of Appeals affirmed. Like the District Court and like the courts at every level in the *Johnson* case, the Court of Appeals did not discuss the legal definition of the term contractor. The sole basis of the Court's decision was its blatantly incorrect statement that the "undisputed facts, as they concern WMATA's responsibility for supervising project construction, are the same ones on the basis of which the Supreme Court concluded, in *Johnson* that WMATA is a general contractor . . ." (App. A at 13a).

In summary, the Court of Appeals erred in the following respects:

First, the Court of Appeals erred in failing to reverse the District Court for refusing to allow the plaintiffs discovery under Rule 26 of the Federal Rules of Civil Procedure. While trial courts have substantial discretion over discovery matters, the trial court obviously abused its discretion in allowing plaintiffs no discovery whatsoever prior to granting summary judgment. The right to adequate prior discovery is inherent in the concept of summary judgment.[31]

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[31]This Court recognized in *Celotex Corp. v. Catrett*, 477 U.S. ____, 106 S.Ct. 2548 (1986), that summary judgment should be granted only "after adequate time for discovery." *Catrett*, 106 S.Ct. at 2552.

Second, the Court of Appeals erred in stating that this Court found WMATA to be a contractor "as a matter of law" in *Johnson*. As noted above, this Court merely deferred to a trial court finding.[32] Thus, even assuming that the factual record in this case was identical to that in *Johnson*, the court erred in finding that it was, as a matter of law, required by *Johnson* to find that WMATA is a contractor.

Third, the Court of Appeals erred in stating that the record in this case was the same as in *Johnson*. As noted above, the record not only contained additional factual matter, submitted by plaintiffs, that was *not present* in *Johnson*, but also *did not* contain much of the factual matter relied upon by the trial courts in *Johnson*.

This Court has on many occasions discussed the rules governing the grant or denial of summary judgment, most recently in *Celotex Corp. v. Catrett*, 477 U.S. ____, 106 S.Ct. 2548 (1986). As the Court noted in *Catrett*, under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must consider all of the factual matter on file, including affidavits. *Catrett*, 106 S.Ct. at 2552. Neither the District Court nor the Court of Appeals mentioned, discussed, or considered the new factual matter submitted by plaintiffs.

As noted above, the plaintiffs, in addition to responding to the District Court's Show Cause Order, filed a motion for partial summary judgment, incorporating numerous documents

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[32]Not one of the trial courts in *Johnson* addressed the legal definition of contractor, and not one of the courts applied a summary judgment standard in finding WMATA to be la contractor. The only trial court in *Johnson* to address the issue in the context of a summary judgment motion where WMATA's status as a contractor was questioned simply concluded that WMATA was a general contractor, without any discussion of the fact or the law. (*Wilmes v. WMATA*, CA No. 81-0114 (Dec. 16, 1982) (included in Appendix to the Petition for Certiorari in *Johnson*). The Court of Appeals in *Johnson* did not address the issue, but appeared to assume for purposes of its decision that WMATA was a contractor.

and attaching an affidavit tending to show that WMATA is not a "contractor," but an "owner."[33] Since WMATA submitted *nothing* in response, this Court's holding in *Catrett,* far from supporting summary judgment for WMATA, should have led to a grant of summary judgment for the plaintifs. WMATA would have the burden of proving at trial, as an affirmative defense, that it is a contractor entitled to immunity. Thus, "(t)he moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Catrett,* 91 L.Ed.2d at 273.

The Court should grant certiorari on the "contractor" issue, for the reasons stated above. Otherwise, the District of Columbia Circuit will have been allowed to create a manner of handling summary judgment motions completely at odds with the Federal Rules of Civil Procedure, decisions of this Court, and the most fundamental principles of law.

CONCLUSION

The decision of the court below frustrates the clearly expressed intent of Congress to permit these petitioners to proceed in their civil actions for negligence against the respondents, and improvidently severs their legal rights from the statutory provisions of the law Congress chose to determine their legal rights. Moreover, the court below has chosen as an analytical vehicle a

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[33]The distinction between a "contractor" and an "owner" is an important one. Owners do not have a secondary obligation to provide compensation to employees of contractors or subcontractors, under Section 904, and thus are not accorded the immunity that this Court decided in *Johnson* goes along with the secondary obligation to secure compensation. The few statutes that give immunity to owners do so when the owner does have a secondary duty to provide compensation, and only when the work being performed was of the type normally done by the owner's own employees. As the unopposed affidavit submitted in this case shows, such is not the case here. *See generally,* 1C A. Larson, *The Law of Workmen's Compensation,* § 49 at 9-1 to 9-105 (1986).

concept, namely that the 1928 Act is a local act which is completely separate (and severable) from the LHWCA, that undermines the very heart of the *Johnson* decision itself. Finally, the Court below has ignored basic principles of summary judgment and has, in effect, taken the unprecedented step of applying the doctrine of collateral estoppel to non-parties to prior litigation. For all these reasons, we urge the Court to grant the petition and reverse the judgment below.

Respectfully submitted,

William F. Mulroney
Peter J. Vangsnes
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Counsel for Petitioner

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-5029, *et al.*,

ROY B. KEENER, *et al.*, APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Nos. 85-5122 & 85-5123

HOWARD DENNIS, *et al.*, APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Nos. 84-5728, *et al.*

STANLEY WILMES, *et al.*,APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action Nos. 81-0114, *et al.*)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued January 21, 1986

Decided September 2, 1986

Peter Vangsnes and *William F. Mulroney*, with whom *James M. Hanny* and *Michelle A. Parfitt* were on the briefs, for appellants.

Walter A. Smith, Jr., with whom *Vincent H. Cohen, Robert B. Cave, Susan M. Hoffman*, and *David F. Grady* were on the briefs, for appellee WMATA.

David P. Durbin, with whom *Edward J. Lopata* was on the joint brief, for appellees Morrison-Knudsen Co., Inc., in Nos. 85-5122 & 85-5123.

Before MIKVA, BORK, and BUCKLEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* BUCKLEY.

BUCKLEY, *Circuit Judge*: On the surface, these three related cases would seem to involve a reasonably straightforward issue, namely, the scope of the immunity against tort actions granted contractors and subcontractors by the workmen's compensation laws applicable to the District of Columbia for injuries incurred before July 26, 1982. Unfortunately, its resolution requires the negotiation of a legal maze involving the interactions of two workmen's compensation statutes enacted by Congress, the repeal of one of them by the District of Columbia in the exercise of its home-rule authority, a Supreme Court decision interpreting the statute at issue in each of the cases before us, and subsequent congressional action designed to reverse the rule enunciated by the Court —all with an eye to the requirements of the federal general savings statute.

It is against this legal backdrop that the rights of the appellants (all of whom seek damages for injuries incurred in the construction of a new subway system) must be determined. For the reasons elaborated below, we conclude that the congressional action reversing the Supreme

Court's rule did not affect the rights and obligations of the parties before us. As a consequence, the Court's ruling continues to control these cases, and we therefore affirm their dismissal by the district court.

I. BACKGROUND

A. *Legal*

As a first step towards an understanding of these cases, we believe it useful to provide a brief description of the legal context within which they must be decided.

In 1927, Congress enacted the Longshoremen's and Harbor Workers' Act, 33 U.S.C. §§ 901 *et seq.* (1982) ("the Longshoremen's Act") in order to provide injured workers in U.S. maritime industries with workmen's compensation protection. The following year, acting in its capacity as the legislative authority for the District of Columbia, Congress provided employees in the District these same benefits by enacting the District of Columbia Workmen's Compensation Act of 1928, D.C. Code §§ 36-501 *et seq.* (1973) ("the 1928 Act"). The statute did so through the simple device of adopting, by reference, the provisions of the Longshoremen's Act, "including all amendments that may hereafter be made thereto." Some fifty years later, after the District of Columbia had achieved home rule, the D.C. Council, in 1979, enacted a statute repealing the 1928 Act and bringing the District's workmen's compensation law into general conformity with that of the neighboring states of Maryland and Virginia. The new law became effective on July 26, 1982. District of Columbia Workers' Compensation Act of 1979, D.C. Code §§ 36-501 *et seq.* (1981) ("the 1982 Act").

On June 26, 1984, in a case involving claims arising from injuries incurred before the 1982 Act became effective, the Supreme Court ruled that the defendant, as general contractor, was entitled to immunity against tort suits under section 905 of the Longshoremen's Act. *WMATA v. Johnson*, 467 U.S. 925 (1984). Three months later Presi-

dent Reagan signed into law the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 ("the 1984 amendments"). These included changes in sections 904 and 905 that were designed to reverse the Supreme Court's holding in *Johnson*. The central issue in each of the cases on appeal is whether the 1984 amendments had any effect on the claims now before us, each of which had been dismissed by the district court pursuant to *Johnson*.

We conclude that as the repeal of the 1928 Act had the effect of severing the application of the Longshoremen's Act to the District of Columbia in 1982, the subsequent 1984 amendments were without effect on the law of the District. While the general savings statute, 1 U.S.C. § 109 (1982), does serve to keep the 1928 Act alive, it does so for the sole purpose of preserving the provisions of the Longshoremen's Act, *as they existed in 1982*, for the benefit of employees whose claims are derived from injuries occurring before the 1982 Act became law. Thus the ruling in *Johnson* remains controlling. As we find no merit in the other points raised by appellants in the cases on appeal, we affirm their dismissal.

B. *Factual*

Appellants in *Keener v. WMATA*, *Dennis v. WMATA*, and *Wilmes v. Bechtel Civil and Minerals, Inc.* all claim to have been injured while working on the construction of a rapid transit subway system for the Washington, D.C. metropolitan area. The construction of the subway is coordinated by the Washington Metropolitan Area Transit Authority ("WMATA"), an agency created by an interstate compact for the purpose of constructing and operating the rapid transit system. In fulfillment of that purpose, WMATA hired subcontractors to work on the construction of the subway. Appellants were employees of these subcontractors or of sub-subcontractors who in turn had been hired by them.

In 1971, WMATA informed its subcontractors that it would secure workmen's compensation insurance for all construction employees working on the subway system and proceeded to purchase a workmen's compensation insurance policy (sometimes referred to as a "wrap up" policy) that covered all individuals working on the subway construction project regardless of who was their direct employer. This relieved subcontractors of any necessity to secure insurance for their own employees. At the same time, it enabled WMATA (as general contractor for the project) to protect itself against potential liability arising out of provisions of the Longshoremen's Act that were applicable to the District of Columbia by virtue of the 1928 Act. (At that time the Longshoremen's Act stated that general contractors "shall be liable for and shall secure the payment of compensation to employees of the subcontractor unless the subcontractor has secured such payment." 33 U.S.C. § 904(a) (1982)). As a result of this arrangement, appellants' workmen's compensation claims were processed under WMATA's insurance policy.

In addition to seeking recovery under WMATA's insurance policy, appellants instituted third-party tort actions in the district court. Initially, many of these actions were brought against two subcontractors of WMATA, Bechtel Civil & Minerals, Inc., and Bechtel Associates Professional Corporation, D.C. The claims against the Bechtel subcontractors were dismissed, however, because they were deemed to be agents of WMATA, and section 80 of the WMATA Compact states that the sole remedy for the torts of WMATA's agents will be by suit against WMATA. *See Johnson v. Bechtel Associates Professional Corp.*, 545 F. Supp. 783 (D.D.C. 1982), *modified*, 717 F.2d 574 (D.C. Cir. 1983), *rev'd on other grounds sub nom. WMATA v. Johnson*, 467 U.S. 925 (1984).

WMATA in turn claimed immunity from tort liability under the Longshoremen's Act, which states that "the

liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee." 33 U.S.C. § 905(a) (1982).

In the cases now before this court in *Wilmes v. Bechtel Civil and Minerals, Inc.*, WMATA argued that as it had secured the payment of the workmen's compensation benefits, it was entitled to immunity as if it were the "employer." The district court agreed and granted summary judgment for WMATA. The order granting summary judgment was appealed. In order to avoid a flood of similar appeals in the remaining cases now before this court in *Keener v. WMATA* and *Dennis v. WMATA*,[1] the district court stayed proceedings pending resolution of the first appeal.

The issue of WMATA's immunity was decided by the Supreme Court in *WMATA v. Johnson*, 467 U.S. 925 (1984), reversing this court's holding in *Johnson v. Bechtel Associates Professional Corp.*, 717 F.2d 574 (D.C. Cir. 1983). The Supreme Court divided its analysis into two parts. First, the Court concluded that the immunity granted to employers under section 905 of the Longshoremen's Act can extend to general contractors. Second, the Court determined that a general contractor qualifies for section 905 immunity if it has not defaulted on its "statutory obligation to secure back-up compensation for subcontractor employees. . . ." *Johnson*, 467 U.S. at 940. The Supreme Court rejected the argument that a general contractor was only entitled to immunity when it was forced into securing compensation because the subcontractor had failed to provide coverage. The Court reasoned that "[i]mmunity is not cast as a reward for employers that secure compensation; rather, loss of im-

[1] While the issues in *Keener* and *Dennis* are virtually identical, appellants in *Dennis* have been allowed to bring a separate appeal based on one issue that distinguishes their case from *Keener*. That issue is discussed later in this opinion.

munity is levied as a penalty on those that neglect to meet their statutory obligations." *Id.* at 937. Thus, so long as coverage was provided, the general contractor qualified for immunity.

On remand, this court entered a supplemental judgment ordering that "the judgment of the district courts on the issue of the immunity of WMATA under § 905(a) of the Longshoremen's Act be . . . affirmed." *Johnson v. Bechtel*, No. 82-2017 (D.C. Cir. Aug. 27, 1984) ("supplemental judgment").[2] A certified copy of the supplemental judgment was sent to the district court the same day. The district court entered final judgment for WMATA on September 21, 1984.

One week later the 1984 amendments to the Longshoremen's Act became law.[3] These amendments changed the statutory language upon which the Supreme Court had based WMATA's immunity with the purpose (as stated in the Joint Conference Report) of stripping *Johnson* of "any precedential effect" in pending as well as future cases. H.R. Rep. No. 98-1027, 98th Cong., 2d Sess. at 24 (1984). On October 12, 1984, the district court's September 21st final judgments were appealed on the ground that the 1984 amendments effectively removed WMATA's immunity. That appeal is now before us in *Wilmes v. Bechtel Civil & Minerals, Inc.*

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[2] On September 26, 1984, appellants in *Wilmes* filed with this court a petition for rehearing of the August 27 supplemental judgment. A ruling denying the petition for rehearing is being issued simultaneously with this opinion.

[3] As a result, the pertinent language of sections 904 and 905 has been changed to read as follows: "A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor." 33 U.S.C. § 904(a) (Supp. 1985). "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4." *Id.* § 905(a).

While this court was dealing with the Supreme Court's remand in *Johnson*, the district court reactivated the cases that had been stayed pending the resolution of *Johnson*. In light of the Supreme Court's holding that WMATA had immunity, the district court issued an order to show cause why the pending cases should not be dismissed. While the parties were responding to the order to show cause, the 1984 amendments were signed into law.

Appellants in *Keener* responded in part to the order to show cause by arguing that the amendments applied to their cases and removed WMATA's immunity. Specifically, they argued that as the 1928 Act still controlled their cases and as the 1928 Act incorporates all subsequent amendments to the Longshoremen's Act, the 1984 amendments must apply to their cases. The district court disagreed, holding that the 1982 Act "expressly repealed the 1928 Act, with the result that the 1928 Act was no longer in existence on September 28, 1984, when the 1984 amendments became effective." *In re: Metro Subway Accident Referral*, Misc. No. 82-306, slip op. at 9 (D.D.C. Dec. 18, 1984). While the district court recognized that the 1928 Act still governed pre-July 26, 1982 accidents, it viewed the 1928 Act as in the legal equivalent of a state of suspended animation, *as of the date of repeal*, for the sole purpose of preserving the rights of those injured prior thereto. After concluding that the amendments did not apply to the District of Columbia and that *Johnson* still controlled, the district court dismissed the cases. The appeal of those dismissals is before us in *Keener v. WMATA*.

II. Discussion

A. *Repeal of the 1982 Act*

The issue of the applicability of the 1984 amendments to District of Columbia workmen's compensation cases is a question of local law. That question has been squarely addressed and conclusively decided by the District of

Columbia's highest court. After a careful review of the relevant statutes and precedents, the District of Columbia Court of Appeals concluded:

> As a result of the Council action repealing the District of Columbia 1928 Act, that act had ceased to exist by 1984, when Congress amended the Longshore Act. Had it not been for the repealer, the 1928 Act would indeed have incorporated those amendments, including the revisions of Section 33 which would have benefitted appellant's cause. But as the 1928 Act was no longer on the books, what Congress subsequently did to the Longshore statute did not affect any rights created by such prior law.

O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134, 1142 (D.C. App. 1985), *cert. denied*, 106 S. Ct. 1378 (1986). As we have recently held, the District of Columbia Court of Appeals is entitled to deference on matters of local law. *Hall v. C&P Telephone Co.*, No. 84-5897 (D.C. Cir. June 24, 1986) (because the 1928 Act is a "local" law, "we find that deference to the District of Columbia Court of Appeals was in order"), slip op. at 8; *Norwood v. Marrocco*, 780 F.2d 110 (D.C. Cir. 1986) ("deferring to a well-reasoned, carefully researched opinion on local law is both appropriate and in keeping with the Congressional purpose reorganizing the judiciary of the District of Columbia").[4] *Id.* at 113.

Appellants contend, however, that the applicability of the 1984 amendments is not simply a matter of local law; and therefore, this court should not defer to the D.C. Court of Appeals on this matter. Specifically, appellants note that District of Columbia workmen's compensation claims for pre-July 26, 1982 injuries continue to be handled by a federal agency, the Department of Labor, and judicial review of how the claims are handled remains in the federal courts. Further, appellants argue

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[4] The District of Columbia Court Reform and Criminal Procedure Act of 1970, PUB. L. No. 91-358, 84 Stat. 473.

that the Longshoremen's Act is a federal statute, and the federal courts should make the final determination of where and how the Act applies. We find appellants' reasoning unpersuasive.

The issue before us affects only District of Columbia workmen's compensation claims. The resolution of the issue depends on what the D.C. Council intended when it passed the 1982 Act. Appellants claim that the Council's purpose was to replace the Longshoremen's Act only with respect to injuries incurred after the adoption of the 1982 Act. Therefore, appellants contend, the 1928 Act remains in full effect for the purpose of defining liability for injuries incurred before July 24, 1982, including the clause incorporating future amendments to the Longshoremen's Act. The D.C. Court of Appeals has ruled otherwise. "In adopting the new act the Council divorced the local worker's compensation system entirely from the Longshoremen's Act of 1927." *O'Connell*, 495 A.2d at 1141.

B. *The 1984 Amendments*

Appellants argue, nevertheless, that whatever the D.C. Council may have intended when it adopted the 1982 Act, it has been overridden by congressional action in 1984; and they cite the Joint Conference Committee Report in support of the proposition that Congress intended to reverse not only the principle enunciated in *Johnson*, but its application to this litigation as well. Whatever the members of the Conference may have intended, however, this is not what they accomplished because the 1928 Act was no longer in existence to extend the reach of the 1984 amendments beyond the Longshoremen's Act itself. Absent explicit statutory language, we decline to accept the argument that expressions of intent in the Conference Report are sufficient to reinstate a law that the D.C. Council repealed in a valid exercise of its powers under the District of Columbia Self-Government Act

of 1973, D.C. Code §§ 1-201 *et seq.* (1981), and as to which Congress declined to exercise its reserved right of veto. *See O'Connell*, 495 A.2d at 1141; *In re Metro*, Misc. No. 82-306 at 5-6.

We find it irrelevant that the Department of Labor has reached a contrary conclusion. *See* 51 Fed. Reg. 4270 (Feb. 3, 1986). We have before us not a question of interpreting *how* the 1984 amendments are to be applied to claims for injuries incurred prior to the 1928 Act's repeal, but of determining *whether* they have any application to those claims whatever. Whereas the former question would enlist the Department's expertise with respect to a matter within its statutory responsibility, the latter involves a pure question of law whose interpretation lies within the exclusive province of the courts.

C. *The General Savings Statute*

Nor can we agree with appellants' contention that the general savings statute, 1 U.S.C. § 109 (1982), requires a different conclusion in this case. In pertinent part, the statute provides:

> The repeal of any statute shall not have the effect to release any penalty, forfeiture, or liability incurred under such statute . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Thus, the repeal of the 1928 Act did not result in a forfeiture of the remedies available *at the time* of repeal for injuries incurred prior to repeal, and no more. D.C. workmen's compensation claimants seeking damages for pre-July 26, 1982 injuries are entitled to the rights and benefits afforded by the 1928 Act as they then existed, and not as they might be modified by subsequent amendment. *O'Connell*, 495 A.2d at 1141-42; *see De La Rama Steamship Co. v. United States*, 344 U.S. 386, 389-91 (1953).

D. *WMATA as General Contractor*

Appellants next contend that even if the 1984 amendments do not apply, WMATA is not entitled to immunity because WMATA is not a general contractor. Appellants argue that WMATA must be viewed as a public owner which has contracted for the construction of the subway with prime contractors who in turn have hired subcontractors. Appellants then conclude that as WMATA is only an owner, and as the Longshoremen's Act does not extend immunity to owners, WMATA is not entitled to immunity.

WMATA's status is a question of fact and law. *See Director, Office of Workers' Compensation Programs v. National Van Lines, Inc.*, 613 F.2d 972, 987 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980). The district court fully reviewed the nature of WMATA's responsibilities for the planning and supervision of the subway construction project. On the basis of its findings of fact, the court concluded, as a matter of law, that WMATA's supervisory duties were those of a general contractor.

We affirmed that conclusion in *Johnson v. Bechtel Associates Professional Corp.*, 717 F.2d 574, as did the Supreme Court in *Johnson*, where it stated:

> Whether WMATA serves as the general contractor for the entire Metro construction project turns on a factual inquiry into WMATA's responsibility for supervising project construction. Because the lower court's findings have ample support in the record . . . we accept their conclusion that WMATA is a general contractor for purposes of § 4(a) of the LHWCA.

467 U.S. at 928 n.5 (citations omitted).

Appellants in *Keener* nevertheless contend that *Johnson* is not controlling because the Supreme Court's decision turned on a factual finding, and a factual finding in one case cannot be binding on a different party in another

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case. Collateral estoppel, they argue, can only be used against a party who was involved in the prior litigation and who had an opportunity to litigate the issue in question. *See McCord v. Bailey*, 636 F.2d 606, 608-09 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981). As appellants concede, however, "there are no material facts in dispute" in this case (Appellants' Brief at 37, *Keener v. WMATA*); and these undisputed facts, as they concern WMATA's responsibility for supervising project construction, are the same ones on the basis of which the Supreme Court concluded, in *Johnson*, that WMATA is a general contractor for purposes of determining its entitlement to Longshoremen's Act immunity. Thus, as a matter of law, we are required by *Johnson* to find that WMATA is a general contractor.

E. *Liability Under WMATA Compact*

Appellants' next contention is that even if WMATA were a general contractor entitled to immunity under the Longshoremen's Act, that immunity does not extend to WMATA's liability for actions arising under section 80 of the WMATA Compact.[5] That section provides, in relevant part, that

> The Authority shall be liable for its contracts and for its torts and those of its directors, officers, employees and agents committed in the conduct of any proprietary function . . . . The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority.

Appellants contend that WMATA's immunity under the Longshoremen's Act should not be given so broad a scope as to protect WMATA from its statutory liability under section 80. This same argument was made before the

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[5] Washington Metropolitan Area Transit Authority Interstate Compact, PUB. L. No. 89-774, 80 Stat. 1324; D.C. Code § 1-2431 (1981).

Supreme Court in *Johnson*. Although the Court did not specifically address the issue, it did state that "WMATA was entitled to immunity from the tort actions brought by respondents." *Johnson*, 467 U.S. at 940. As the section 80 issue had been fully argued in the briefs before it, we conclude that the Supreme Court found WMATA to be entitled to immunity despite appellants' appeal to section 80.

This conclusion, moreover, is fully consistent with the Court's summation of the central purpose of workmen's compensation laws:

> On both sides there is a *quid pro quo*. In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits.

Johnson, 467 U.S. at 931. The language of the Longshoremen's Act accomplishes this purpose by stating that the employer's obligation to secure compensation is "exclusive and in place of all other liability of such employer to the employee . . . on account of such injury or death . . . ." 33 U.S.C. § 905(a). This objective would be frustrated if WMATA were not granted immunity from liability for its agents' torts.

F. *Immunity of Intermediate Subcontractors*

The second case before us, *Dennis v. WMATA*, involves suits brought by employees of sub-subcontractors against WMATA and intermediate subcontractors positioned in the contractual chain between WMATA and the injured workers' employers. In addition to raising the issues discussed above, appellants challenge the district court's conclusion that *Johnson* requires the extension of immunity to intermediate subcontractors as well as to the general contractor on the one hand, and a claimant's immediate

employer on the other. *In re: Metro Subway Accident Referral*, Misc. No. 82-306 (D.D.C. Sept. 19, 1984).

Appellants advance the novel theory that because WMATA has been granted immunity as a result of "*its* contingent liability to *all* employees on the entire project," and because "*any* injured employee may claim compensation benefits directly" from WMATA, "if an intermediate employer has failed to 'secure' the payment of compensation pursuant to Section 932(a) of the Act," it must follow that those intermediates are not subject to the contingent liability under § 904(a) that is required to qualify for immunity under § 905(a). (Brief for Appellants at 38 (emphasis in original), *Dennis v. WMATA*).

This theory flies in the face of the Supreme Court's holding that under the Longshoremen's Act, employers enjoy immunity until such time as it is forfeited through their failure to meet their statutory obligation to their employees. *Johnson*, 467 U.S. at 938. In fact, appellants concede that the *Johnson* holding "is predicated on the Court's conclusion that the general contractor's contingent liability under . . . Section 904(a) extends to the employers of subcontractors at all tiers." (Brief for Appellants at 37, *Dennis v. WMATA*). Nevertheless they ask us, in effect, to ignore the Court's position because, they claim, it is at variance with the prevailing rule. This we decline to do, and not merely because of the impropriety of the suggestion. What appellants describe as the Supreme Court's "extraordinary pronouncement," *id.*, does not more than give expression to the common sense of the matter. Complex construction projects entail chains of contractors, subcontractors, and sub-subcontractors. A statutory scheme that would grant immunity only to the first and last links in the chain, while subjecting all the intermediaries to common law tort liability, would make no sense whatever. Each employer in the chain is subject to contingent liability under section 904(a), and each has a stake in the accom-

modation between employee compensation and employer liability that lies at the heart of the Longshoremen's Act. In short, we can find nothing in law or logic to support the appellants' thesis, and decline to do so.

G. *Finality of Judgment in* Wilmes

The third case before us, *Wilmes v. Bechtel Civil and Minerals, Inc.*, is an appeal from judgments entered by the district court following the Supreme Court's remand in *Johnson*. Appellees oppose the appeal on jurisdictional grounds arguing, *inter alia*, that the judgments of the district court were final and not open to appeal. We decline to resolve the jurisdictional issues because even if appeal were to proceed, our holdings in *Keener* and *Dennis* would require that we affirm *Wilmes* on the merits. *See Murray v. Buchanan*, 720 F.2d 689, 690 (D.C. Cir. 1983) (en banc) (court declined to proceed with the review of a jurisdictional question after the Supreme Court had issued an opinion that settled the substantive issues in the case).

III. Conclusion

As we conclude that the 1984 amendments do not reach the 1928 Act, the *Johnson* decision continues to control in all these cases. The district court's decisions dismissing these actions are therefore

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986
CA No. 81-01057

NO. 85-5029

Roy B. Keener, *et al.*

v.

Washington Metropolitan
Area Transit Authority

And Consolidated Cases

NO. 85-5122

Howard Dennis, *et al.*

v.

Washington Metropolitan
Area Transit Authority

And Consolidated Case 85-5123

NO. 84-5729

Stanley Wilmes,*et al.*

v.

Bechtel Civil and Minerals,
Inc., *et al.*

And Consolidated Cases

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ginsburg, Bork, Starr, Silberman, Buckley and Williams, Circuit Judges

ORDER

Appellants' suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that appellants' suggestion for rhearing *en banc* is denied.

Per Curiam

BY THE COURT:
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
For The District of Columbia Circuit

FILED OCT 17 1986

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5029, et al. **September Term, 1985**
Civil Actions Nos. 81-01057 et al

Roy B. Keener, et al,
Appellants

v.

Washington Metropolitan Area Transit Authority

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, BORK, and BUCKLEY, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these

causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
George A. Fisher
Clerk

Date: September 2, 1986
Opinion for the Court filed by Circuit Judge Buckley

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED SEP 2 1986
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5028, et al. **September Term, 1985**
Civil Actions Nos. 81-0114, et al

Stanley Wilmes, et al,
Appellants

v.

Bechtel Civil and Minerals, Inc., et al.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, BORK, and BUCKLEY, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED SEP 3 1986
GEORGE A. FISHER
Clerk

Date: September 2, 1986
Opinion for the Court filed by Circuit Judge Buckley

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5122 & 85-5123 **September Term, 1985**
Civil Actions Nos. 83-01638 and 83-02847

Howard Dennis, et al,
Appellants

v.

Washington Metropolitan Area Transit Authority

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, BORK, and BUCKLEY, Circuit Judges.

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in these causes is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/ George A. Fisher
George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED SEP 2 1986
GEORGE A. FISHER
Clerk

Date: September 2, 1986
Opinion for the Court filed by Circuit Judge Buckley

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: METRO SUBWAY)
(Misc. No. 82-306
ACCIDENT REFERRAL)

MEMORANDUM OPINION

In the latest court action of this protracted litigation, Judge Gerhard A. Gesell on July 31, 1984 issued a show cause order, directing plaintiffs to provide "a detailed legal and factual explanation" in support of their position opposing dismissal of the filed cases.[1] Proceedings in these cases had been stayed since December 23, 1982. WMATA had moved to dismiss.

The Gesell order was predicated on the action of the Supreme Court in *Washington Metropolitan Area Transit Authority v. Johnson, et al.*, 104 S. Ct. 2827, 2836 (1984) (hereinafter *Johnson*). In *Johnson*, decided June 20, 1984, the court reversed the United States Court of Appeal for the District of Columbia Circuit,[2] and held that the term "employer" used in § 5(a) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA Or 1927 Act) was intended to include general contractors as well as direct employers, that WMATA qualified for § 5(a) immunity as a general contractor as long as it did not fail to meet its obligation to secure compensation for subcontractor employees under § 4(a), and that WMATA not only did not fail to meet its statutory obligation but acted above

[1]There are approximately 99 such cases.

[2]*Johnson, et al. v. WMATA, et al.*, 717 F.2d 574 (1983).

and beyond such obligation by purchasing "wrap-up" insurance on behalf of all of its subcontractors. Therefore, WMATA was immune from liability in the tort actions asserted by respondents.

Johnson, on its face, would have been dispositive of the issues raised by the "show cause" order of July 31, 1984, except that Congress on September 28, 1984, amended the LHWCA to provide that a general contractor in WMATA's position would not be entitled to immunity under § 5(a) of that Act.[3] Section 5(a) of the LHWCA was amended by adding the following new sentence:

> For the purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

Congress specifically expressed its disapproval of *Johnson* by providing that a general contractor in WMATA's position would be amenable to suit and furthermore that the amendment would apply retroactively to all pending cases.[4] The plaintiffs' Response to the Show Cause Order was filed on August 31, 1984 and therefore did not address the problems raised by the amendments subsequently enacted on September 28,1984. Instead, plaintiffs rely on claims which were either disposed of in *Johnson*[5] or have become

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[3]Longshore and Harbor Workers' Compensation Act Amendments of 1984. Pub. L. No. 98-426 (1984) (hereinafter 1984 amendments).

[4]Joint Explanatory Statement of Committee of Conference, Cong. Rec. H 9598 (Sept. 14, 1984).

[5]Plaintiffs argue principally that: (1) WMATA is not a general contractor within the meaning of the LHWCA; (2) WMATA is not entitled to immunity for the torts of its subcontractors; and (3) WMATA is not entitled to immunity for the torts of its agents. Plaintiff would confine WMATA's immunity to its own torts.

moot because of the amendments by Congress. Plaintiffs also attempt to distinguish *Johnson* on the grounds that *Johnson* was predicated on the mistaken assumption that these cases were governed by the 1928 Act which made the original 1927 Act applicable to the District of Columbia rather than on the 1979 Act (New Act) which became effective July 24, 1982. With the passage on September 28,1984 of the amendments to the LHWCA, they have retreated from this position and now concede the applicability of the 1928 Act.[6]

The basic issue is the ultimate reach of the 1984 amendments to the LHWCA and whether they require us to disregard the Supreme Court's decision in *Johnson*. WMATA in its submission of October 12, 1984 faces this issue head-on.[7] It claims that (1) the 1984 amendments are simply not applicable to these cases because they reach no further than the 1927 Act, which no longer governs the compensation claims of non-maritime employees in the District of Columbia and (2) if held to be retroactive, the amendments would be unconstitutional. We address ourselves to the first of these two contentions.

The Relevant Legislation

The original Longshoremen's and Harbor Workers' Compensation Act of 1927, as the title would imply, concerns the compensation for injuries sufferred by maritime employees. 33 U.S.C. §§ 901, *et seq.* It was nationwide in coverage and did not cover non-maritime employees. It is

[6]Plaintiffs' present position is reflected in its submission of October 26, 1984. Plaintiffs' Reply to Defendants' Reply to Plaintiffs' Response to the Court's Show Cause Order, p. 3.

[7]WMATA Reply of October 12, 1984 to Plaintiffs' Response to Show Cause Order.

appropriately listed under "Chapter 33-Navigation and Navigable Waters of the United States Code. When enacted, the LHWCA therefore did not apply to non-maritime employees in the District of Columbia.

This situation was soon to change. In 1928 Congress, acting as legislature for the District of Columbia and desiring to provide protection for workers in the District, passed the District of Columbia Workers' Compensation Act of 1928. D.C. Code, §§ 36-501, *et seq.* (1973 ed.) (Old or 1928 Act). It accomplished this result by making reference to the provisions of the 1927 Act and, where relevant, making them applicable to the District of Columbia. It used the following language for this purpose:

> The provisions of Chapter 18 of Title 33, U.S. Code, *including all amendments that may hereafter be made thereto,* shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia irrespective of the place where the injury or death occurs; . . . . (emphasis supplied).

D.C. Code § 36-501 (1973 ed.).[8] In passing the 1928 Act, Congress did not amend or purport to amend the LHWCA, but enacted a separate law making the LHWCA's requirements applicable to all workers in the District of Columbia. Until July 24, 1982, workmen's compensation protection for non-maritime workers in the District of Columbia was provided under the 1928 Act, which, while incorporating the standards of the 1927 Act, is applicable only to this particular jurisdiction.

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[8]The Old Act contains three brief additional provisions not relevant to the issue discussed herein. D.C. Code §§ 36-502-04.

Matters remained in this posture until 1973. In that year Congress, again acting as legislature for the District of Columbia, passed the District of Columbia Self-Government and Governmental Reorganization Act, known commonly as the "Home Rule Act." D.C. Code §§ 1-201, *et seq.* Reflecting a desire to relieve Congress of its long-time burden of having to legislate on local District matters and to provide the powers of self-government to District residents, this Act gave the District of Columbia City Council the power, subject to certain specified exceptions not here relevant, to amend or repeal any provision in the District of Columbia Code. D.C. Code § 1-208(b). At the same time, Congress reserved its plenary authority, as legislature for the District, to enact legislation for the District and to amend or repeal any act passed by the D.C. City Council. D.C. Code § 1-206.

At this stage, the District of Columbia exercised for the first time its jurisdiction in the field of workmen's compensation. In 1980, the City Council, acting pursuant to its powers under the Home Rule Act, passed the District of Columbia Workers' Compensation Act, D.C. Code §§ 36-301, *et seq.* (New Act). This legislation established an entirely new set of standards and procedures for the handling of non-maritime worker compensation claims in the District of Columbia. At the same time, § 46 of the New Act provided tht the 1928 Act "is hereby repealed." New Act § 46 (27 D.C. Reg. at 2541). Congress permitted the New Act, including the repeal of the 1928 Act, to take effect by choosing not to exercise its right under the Home Rule Act to veto within the 30-day waiting period. D.C. Code § 1-233(c)(1). The effective date of the New Act is July 24, 1982. D.C. Code § 36-345.

The next event in this chronology of the legislative history took place on September 28, 1984. On this date, Con-

gress enacted legislation extensively amending the LHWCA of 1927.[9] Two of the amendments related to §§ 4(a) and 5(a) of the Act and are the focus of this litigation. They have the effect of providing that a general contractor in WMATA's position would not be entitled to immunity under § 5(a) of the Act and are to be applied retroactively to all pending cases. Although the *Johnson* case is not mentioned or referred to in the legislation itself, the Joint Statement of the Conferees makes it abundantly clear that it disapproves the Supreme Court's action in *Johnson* as not comporting with "the legislative intent of the Act nor its interpretation from 1927 through 1983."[10]

Discussion

There can be no dispute that the Congress has always reserved the full power, despite the Home Rule Act, to legislate in the field of workmen's compensation for the District of Columbia. It is less clear that it intended to make its disapproval of the *Johnson* decision applicable to the District of Columbia as well as to the rest of the nation.[11] For the purpose of this discussion, we need not speculate as to the intent of Congress, but accept as a fact that the Congress in enacting the 1984 amendments intend-

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[9]Footnote 3, *supra.*

[10]Joint Explanatory Statement of the Committee of Conference, Cong. Rec. H. 9598. The accuracy of this statement does not square with the Supreme Court's assertion to the contrary and is subject to challenge. Johnson, supra, 104 S.Ct. 2832-33.

[11]The Joint Statement of the Conferees is somewhat ambiguous as to whether the Congress was thinking of the Johnson litigation or the principle embodied in the Johnson decision. It states: "This (making these amendments apply to pending suits) will avoid the dismissal, under WMATA, of the third party suits which were pending or on appeal on the date of the enactment." Joint Explanatory Statement, *supra.*

ed the amendments to §§ 4(a) and 5(a) of the 1927 Act to apply to the District of Columbia and therefore to this litigtion. The crucial question is not whether Congress possessed the power and had this intent, but whether the means it employed achieved this result. Plaintiffs claim that based on the plain language of the 1984 amendments to §§ 4(a) and 5(a) of the 1927 Act, the language of the 1928 Act, as well as legislative history of the 1984 amendments, they are clearly intended to and do apply to the District of Columbia. If we accept these premises, the 1984 amendments effectively overruled the *Johnson* decision and these cases, otherwise controlled by *Johnson*, are still viable and not subject to dismissal.

On the other hand, WMATA also relies on the plain language of the 1984 amendments and the legislative history. As a result WMATA contends that the amendments are not applicable to the 1928 Act and therefore do not reach the cases before the court.

Both sides agree that a court should apply the law in effect at the time of its decision, absent statutory direction or legislative history to the contrary. The City Council has provided, without objection from Congress, that the New Act is applicable to claims arising after July 24, 1982, the effective date of the New Act. There is no indication in the legislative history of the New Act that the City Council intended that claims arising prior to the Act's effective date were to be governed by that Act. It has been determined by the highest court in this jurisdiction that claims arising before July 24, 1982, are governed by the 1928 Act. *Garrett v. Washington Air Compressor Co., Inc.*, 466 A.2d 462, n. 1 (1982) (claim arising before effective date of New Act held governed by 1928 Act); *see also Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1103 n. 2 (1983). Plain-

tiffs, after originally contending that the applicable District of Columbia law is to be found in the New Act whose immunity provisions allegedly would have been overruled by the 1984 amendments, now have agreed with WMATA that these cases are to be governed by the 1928 Act.[12]

With respect to the issue presented, plaintiffs contend that the 1984 amendments to the 1927 Act are applicable to the 1928 Act, and to cases brought under that Act. WMATA, on the other hand, asserts that the 1928 Act, having been effectively repealed by the New Act, cannot provide a nexus for the application to the 1928 Act of the 1984 amendment to the original 1927 Act. We are compelled to agree with WMATA's position that the 1984 amendments, while having the effect of overruling *Johnson,* in its nationwide application, do not reach these District of Columbia cases.

In the first place, the 1984 amendments are specifically designed to make broad and extensive changes in the LHWCA of 1927. Among those numerous changes are two short amendments to §§ 4(a) and 5(a). Close reading of the statute demonstrates that the District of Columbia is not anywhere referred to either expressly or by implication. These amendments are specifically directed to the LHWCA, an act of nationwide coverage. This is the clear language of the amending statute.

Secondly, the possible applicability of the 1984 amendments to the District of Columbia rests upon the continuing viability *in proprio vigore* of the 1928 Act, a separate act admittedly applicable only to the District of Columbia which incorporated by reference the standards of the LHWCA and all subsequent amendments made thereto. It

[12]Footnote 6, *supra*; WMATA's Supplemental Memorandum filed Nov. 9, 1984, p. 2.

is undisputed that the New Act expressly repealed the 1928 Act, with the result that the 1928 Act was no longer in existence on September 28, 1984, when the 1984 amendments became effective. When the 1984 amendments to the 1927 Act were passed, the 1928 Act which otherwise would have automatically incorporated these amendments, no longer existed as a conduit. Having been repealed, the 1928 Act could not be affected by amendments to the 1927 Act.

Plaintiffs claim that since these cases were brought under the 1928 Act, the 1928 Act must have remained in existence, despite its subsequent repeal, and therefore was subject to any amendments to the 1927 Act. Plaintiffs overlook the effect of "saving statutes" which apply to both Federal and District of Columbia legislation.[13] As WMATA points out, these savings statutes do not undo a repeal but provide that rights and liabilities existing at the time of the repeal will continue to exist. The status quo as of the date of the repeal preserves and protects these accrued rights and liabilities, even though the statute under which they arose has been repealed.[14] Except for the limited purpose of setting forth the standards which govern

[13]*See* 1 U.S.C. § 109, which provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

This statute is a general act of Congress applicable to the District of Columbia. D.C. Code § 49-301.

[14]Suspended animation is not a novel legal concept. For example, corporations no longer in existence for the purpose of carrying on business, still continue to exist for the purpose of suing and being sued. 29 D.C. Code § 108.

cases filed prior to July 24, 1982, the 19289 Act no longer exists.

Finally, the 1984 amendments do not in any way attempt to repeal the New Act or to overturn the New Act's repeal of the 1928 Act. It is well-settled that implicit repeals of statutes are not favored. Moreover, even if the 1984 amendments expressly repealed the New Act, such repeal would not have revived the 1928 Act, in the absence of clear evidence of Congressional intent to revive.[15]

To conclude, these claims are governed and continue to be governed by the standards of the 1928 Act as such standards existed prior to the passsage of the New Act on July 24, 1982. The *Johnson* decision, which preceded the passage of the 1984 amendments, applied the law in effect at the time it acted and held that WMATA is immune from liability in the pending actions. Congress' disapproval of the results in *Johnson* extends no further than the 1927 Act. Cases brought under the repealed 1928 Act are not affected. The decision in *Johnson* as applied to District of Columbia cases controls and plaintiffs' claims against WMATA shall be dismissed. Since these cases are disposed of on statutory grounds, it is not necessary to reach defendant's constitutional claims.

An order consistent with the foregoing has been entered this day.

/s/ J.H. Pratt
John H. Pratt
December 18th, 1984. United States District Judge

[15]"Whenever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, unless it shall be expressly so provided." 1 U.S.C. § 108.

FILED
DEC 18 1984
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: METRO SUBWAY)
(Misc. No. 82-306
ACCIDENT REFERRAL)

ORDER

Upon consideration of the submissions of the parties, the entire record herein and after oral argument, it is by the court this 18th day of December, 1984,

ORDERED that WMATA's motion to dismiss be and the same hereby is granted, and it is

ORDERED that these actions are dismissed with prejudice;* and it is

FURTHER ORDERED that a copy of this order shall be filed in the court jackets of all pending cases covered by this order.

/s/ J.H. Pratt
John H. Pratt
United States District Judge

*The following cases, which involve claims against parties in addition to WMATA, are not dismissed:
Civil Action No. 81-871 Rudolph
Civil Action No. 83-396 Seal
Civil Action No. 83-440 Brown
Civil Action No. 84-1531 Renteria

FILED
DEC 18 1984
JAMES F. DAVEY, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: METRO SUBWAY)
) Misc. No. 82-306
ACCIDENT REFERRAL)

MEMORANDUM

Before the Court are motions for summary judgment by defendant subway construction subcontractors in seven cases. The motions have been fully briefed and argued by the parties.[1] The cases, referred to hereinafter by the plaintiff's name, are:

83-0871	Ludolph	Judge Joyce Green; see Part II-B below
83-0396	Seal	Judge Gesell; see Part II-B below
83-0440	Brown	Judge Gasch; see Parts II-A and II-C below
83-1638	Dennis	Judge Gesell; see Part II-A below
83-2567	Fuller	Judge Flannery; see Part I below

[1]In three other cases originally argued by the parties as part of this motion, the parties have consented to dismissal of all subcontractor defendants. Those cases are:

84-0284	Royal	Judge Gasch
84-0360	Pryor	Judge Richey
84-1528	McMillian	Judge Greene

83-2847	Anderson	Judge Gash; see Part II-A below
84-1531	Renteria	Judge Penn; see Parts I and II-C below

These cases fall into several categories of issues, which will be considered in turn below.

I. Fuller and Renteria

These plaintiffs oppose summary judgment on a basis similar to that raised by other plaintiffs and considered below — that they should not be barred from suing lateral contractors with whom they had no employer/employee relationship. The Court cannot consider this issue in these two cases, except as to one subcontractor defendant in Renteria's suit, because plaintiff's counsel failed to comply with the rules regarding summary judgment.

Both Fuller and Renteria now contend that they were safety inspectors employed by Bechtel and were not employed by any of the construction contractors whom they have named defendants.[2] This is contrary to the allegations in each of their complaints,[3] with one exception for

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[2]There is one exception to this statement. Fuller concedes he was an employee of the Dravo Corporation before becoming a Bechtel inspector. He states he will dismiss Dravo as a defendant.

[3]Neither plaintiff in his complaint contends he was employed by Bechtel. Fuller expressly alleges he worked for defendants Ball and Healey, complaint Count VII, ¶ 5, the only two remaining subcontractor defendants in his suit. Renteria expressly alleges he worked for defendants Fruin & Colnon and Horn, complaint Count III, ¶ 5, defendants Kiewit and Shea, Count V, ¶ 5, and defendants Ball, Healey and Granite, Count IV, ¶ 5.

plaintiff Renteria.[4] Moreover, neither plaintiff has amended his complaint to allege there was no employer/employee relationship. Their new allegations also are not supported by affidavits or other evidence in the record. See Local Rule 1-9(h), requiring the party opposing summary judgment to set forth material facts in dispute and to "include therein references to the parts of the record relied on to support such statement." Because the Court must accept as true the factual allegations in a plaintiff's complaint, the Court can proceed to consider the issue of whether these plaintiffs are entitled to maintain their suits against lateral contractors only where that issue is properly raised in the complaints. Accordingly, Fuller's claims against subcontractors named in his complaint must be dismissed in their entirety, and Renteria's must be dismissed with the one exception noted in footnote 4 above for defendants MacLean Grove.

II. The Remaining Cases

The remaining cases, along with Renteria's suit as to defendant MacLean Grove, raise issues requiring the Court to interpret the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, in light of the recent Supreme Court decision in *WMATA v. Johnson*, 104 S.Ct. 2827 (1984).[5] The cases concern the right of

[4]Renteria does not allege in his complaint that he worked for MacLean Grove, the only other defendant in his action. Complaint, Count VII, ¶ 4.

[5]At oral argument, the parties advised the Court of legislation pending in Congress to overrule the *Johnson* decision both prospectively and in all cases pending or on appeal as of the date of the legislation's enactment. *See* 130 Cong. Rec. H9592, H9598 (daily ed. Sept. 14, 1984). The parties suggested the Court await the outcome of that legislation. But it is the Court's duty to apply the law as it exists. Even if the bill passes in its present form, it would affect the outcome only in those cases considered in Part II-A below. Thus the Court sees no sense in delaying further the resolution of these issues.

these plaintiffs to maintain common-law tort actions against subcontractors on the subway project in three situations: (1) where the defendant is a subcontractor which subcontracted part of its subcontract to the plaintiff's employer, and thus the plaintiff is maintaining a "vertical up" suit against a subcontractor above his employer in the contractual chain: (2) where the defendant is a subcontractor that received a subcontract from the plaintiff's employer, and thus the plaintiff is maintaining a "vertical down" suit against a subcontractor below his employer in the contractual chain, and (3) where the defendant and the plaintiff's employer were each working as subcontractors on the same site with no contractual relationship with each other, and thus the plaintiff is maintaining a "lateral" suit.

A. The "Vertical Up" Suits: Anderson, Brown and Dennis

These plaintiffs[6] argue, without further support, that only one contractor on the entire subway project can be considered the contractor for purposes of immunity under 33 U.S.C. §§ 904(a) and 905(a) from common-law tort ac-

[6]Plaintiff Anderson agrees to dismiss five defendants who were his actual employers: Ball, Healy, Granite, Kiewit & Sons, and Keystone Steel. He seeks to continue the action against Morrison & Knudsen, a subcontractor to which Anderson's employer Keystone Steel was a sub-subcontractor. Plaintiff Brown seeks to maintain his suit against Slattery Associates as a "vertical up" action and against MacLean Grove as a "lateral" action. The lateral issue will be considered below. Plaintiff Dennis seeks to continue his action against defendants Kiewit/Shea, McHugh, Ball/Healy, and Ball/Healy/Granite. Dennis alleges he worked as an electrician for a subcontractor employed at sites controlled by McHugh, Ball/Healy, and Ball/Healy/Granite. Because he alleges he was employed by Kiewit-Shea, complaint Count V, ¶ 5, that defendant is dismissed for the reasons stated above in regard to the Fuller and Renteria suits.

tions by injured workers of its subcontractors, and that because the Supreme Court in *Johnson* found WMATA to be the immune contractor, no other contractor on the project can obtain contractor immunity.

In *Johnson*, the Supreme Court rejected the view that a contractor can obtain Section 905(a) immunity as to its subcontractors' employees only when it has secured compensation insurance in satisfaction of a statutory duty. The Court held instead that as long as a contractor does not default on its contingent statutory duty under Section 904(a) to secure compensation for the employees of a subcontractor, it is entitled to immunity. 104 S.Ct. at 2834-35. There is no question in these cases that the subcontractor defendants did not default. The issue, rather, is whether they had a contingent statutory duty in the first place. In other words, the question is whether the defendants here, who were subcontractors for purposes of their relationships with WMATA, properly should be considered contractors for purposes of their relationships with the employers of the plaintiffs here.

The straightforward answer to this question is yes. A contractor for purposes of Section 904(a) is an entity with a contractual obligation part of which it delegates to a subcontractor. *See Director, Office of Workers' Compensation Programs v. National Van Lines, Inc.*, 613 F.2d 972, 986-87 (D.C. Cir. 1979). It does not matter that this contractor itself is a subcontractor to a contractor above it, rather than a contractor with an owner above it. *See* 1C A. Larson, *The Law of Workmen's Compensation* § 49.11 at 9-13 to 9-16 (1982). Accordingly, at least as to the subcontractors directly above plaintiffs' actual employers in these cases, those subcontractors have a contingent liability under the statute. Because they did not default on that duty,

under *Johnson* they are immune. The fact that in *Johnson* the Supreme Court also granted immunity further up the contractual ladder to WMATA is no argument for somehow hopscotching over the intervening subcontractors and finding that they had no contingent statutory liability to those subcontractors directly below them.

B. The "Vertical Down" Suits: Ludolph and Seal

Ludolph alleges he was employed by the Ball/Healy Granite joint venture and was injured by the negligence of Keystone Steel, one of Ball/Healy/Granite's subcontractors. Seal alleges he was employed by Bechtel, an agent of WMATA, and that he was injured by Slattery Associates, one of WMATA's prime contractors. Their suits down the contractual ladder are plainly different from the "vertical up" suits, because there is no statutory contingent liability for a sub-subcontractor to the employees of a subcontractor above it. *See* 2A A. Larson, *The Law of Workmen's Compensation* § 72.32 at 14-157 to 14-160. It is irrelevant whether Keystone or Slattery did not default on their own statutory liability to any sub-subcontractors below them. There must exist some contingent liability under Section 904(a) for immunity to obtain. Accordingly, the subcontractors' motions for summary judgment is denied in these suits.

C. The "Lateral" Suits: Brown and Renteria[7]

Under the foregoing analysis, it is even more apparent that where there is no contractual relationship at all between employers, as in the case of lateral subcontractors

[7]This part of the Memorandum considers aspects of the Brown and Renteria suits involving lateral subcontractor defendants not disposed of in the earlier discussions of these two actions.

working on the same site, they cannot be considered to have a contractor/subcontractor relationship triggering Section 904(a) immunity. The defendants argue, as they argued in the "vertical down" suits, that the Supreme Court extended statutory immunity to all contractors and subcontractors against all employees, no matter what the relationship was between the parties, as long as contingent liability under Section 904(a) was not defaulted. There is no indication in the Supreme Court's opinion that it intended to so sweepingly do away with third-party tort actions by injured workers. Indeed, its opinion in *Johnson* is premised on the existence of a contingent statutory liability from WMATA to the plaintiffs there. Without a finding of contingent liability by the contractor, it would make no sense to discuss whether immunity was triggered by a subcontractor's actual default or, as the Court ultimately found, by the contractor's not having defaulted on its statutory obligation. Accordingly, the motions to dismiss lateral subcontractor defendants are denied.

For convenience, the Court summarizes its holdings in the individual cases below:

81-0871	Ludolph	No parties dismissed
83-0396	Seal	No parties dismissed
83-0440	Brown	Slattery Associates dismissed; MacLean Grove not dismissed
83-1638	Dennis	All subcontractor parties dismissed
83-2567	Fuller	All subcontractor parties dismissed

83-2847	Anderson	All subcontractor parties dismissed
84-1531	Renteria	All subcontractor parties except MacLean Grove dismissed

An appropriate order is filed herewith.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

September 19, 1984

FILED
SEP 19 1984
JAMES F. DAVEY, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: METRO SUBWAY)
) Misc. No. 82-306
ACCIDENT REFERRAL)

ORDER

Upon consideration of defendant subcontractors' motions for summary judgment, plaintiffs' oppositions thereto, and the entire record herein, for reasons stated in an accompanying Memorandum, it is hereby ordered that the motions are granted in part and denied in part as set out below:

1. Civ. No. 81-0871, plaintiff Ludolph: motion denied.

2. Civ. No. 83-0396, plaintiff Seal: motion denied.

3. Civ. No. 83-0440, plaintiff Brown: motion granted as to and judgment entered for Slattery Associates, denied as to MacLean Grove.

4. Civ. No. 83-1638, plaintiff Dennis: motion granted as to and judgment entered for all subcotnractor defendants.

5. Civ. No. 83-2567, plaintiff Fuller: motion granted as to and judgment entered for all subcontractor defendants.

6. Civ. No. 83-2847, plaintiff Anderson: motion granted as to and judgment entered for all subcontractor defendants.

7. Civ. No. 84-1531, plaintiff Renteria: motion granted as to and judgment entered for all subcontractor parties except denied as to MacLean Grove.

It is further ordered that the stay entered in these cases

shall remain in effect pending disposition of motions for summary judgment on behalf of defendant WMATA, pending before Judge Pratt.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

September 19, 1984

FILED
SEP 19 1984
JAMES F. DAVEY, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017 **September Term, 1985**
Civil Actions No. 81-00963

Paul D. Johnson,
Appellants

v.

Bechtel Associates Professional
Corporation, D.C., et al.

And Consolidated Cases

BEFORE: Robinson, Chief Judge; Wright, Circuit Judge, and MacKinnon, Senior Circuit Judge

SUPPLEMENTAL JUDGMENT

Upon consideration of the Opinion of the Supreme Court filed on June 26, 1984 and of the subsequent mandate of that Court, it is

ORDERED by this Court that the Judgment of August 19, 1983 is vacated to the extent it reversed the grants of summary judgment by the District Courts on the issue of immunity under §905(a) of the Longshoremen's Act and it is

FURTHER ORDERED by this Court that the judgments of the District Courts on the issue of the immunity of WMATA under §905(a) of the Longshoremen's Act be, and the same hereby area, affirmed.

The Clerk is Directed to transmit a certified copy of this Supplemental Judgment to the District Courts in lieu of formal mandates.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

a true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit
By: /s/ [Illegible] Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED AUG 27 1984
GEORGE A. FISHER
CLERK

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STANLEY WILMES	)	
	)	
v.	)	Civil Action
	)	No. 81-0114
BECHTEL CIVIL AND MINERAL, INC. *et al.*,	)	
	)	
	)	

ORDER

Upon consideration of the Supplemental Judgment of the United States Court of Appeals of the District of Columbia Circuit in *Paul D. Johnson v. Bechtel Associates Professional Corporation, D.C., et al.,* No. 82-2017 and consolidated cases, filed on August 27, 1984, it appearing that the Court of Appeals' Supplemental Judgment directs that the judgment of the District Court dismissing the above-captioned action be affirmed and that a certified copy of the mandate has been docketed in this Court on September 4, 1984, it is this 21 day of September 1984,

ORDERED That the clerk of this Court be and is hereby directed to enter final judgment as to the Washington Metropolitan Area Transit Authority in the above-captioned action.

/s/ Gerhard A. Gesell
United States District Judge

APPENDIX G

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-1784

HOWARD L. EIGHMEY, *et al.*, APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

No. 82-1809

CALVIN WALKER, *et al.*, APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., *et al.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-1813

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-1899

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2062

CALVIN WALKER AND RENA WALKER, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2063

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2148

HOWARD L. EIGHMEY, *et al.*, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2374

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2458

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2459

JAMES H. BUCHANAN AND SHIRLEY BUCHANAN, HIS WIFE, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2525

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2529

CALVIN WALKER, *et al.*, APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 82-2530

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*

No. 82-2531

HOWARD L. EIGHMEY, *et al.*, APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 83-1003

GLENWOOD WILLIAMS, APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(Civil Action Nos. 81-00963, 81-01261, 81-01125, 81-01481, 81-00114, 81-03057 and 82-00999)

On Petition for Rehearing

Filed September 2, 1986

William F. Mulrooney and *Peter J. Vangsness* were on appellants' petition for rehearing.

Gary W. Brown and *William G. Schaefer* were on the responses of appellees Bechtel Associates Professional Corporation, *et al.*

Vincent H. Cohen and *Robert B. Cave* were on the responses of appellee Washington Metropolitan Area Transit Authority.

Before ROBINSON, *Circuit Judge*, and WRIGHT and MACKINNON, *Senior Circuit Judges*.

Opinion Per Curiam.

PER CURIAM: Appellants petition the court to reconsider its supplemental judgment of August 27, 1984,[1] affirming the District Court's prior rulings that appellee Washington Metropolitan Area Transit Authority (WMATA) enjoyed immunity from appellants' tort claims. The petition comes in light of legislation, enacted shortly after our judgment issued, that assertedly dictates the outcome of the case. Appellants also endeavor to raise new questions about WMATA's immunity. Because appellants' arguments are properly to be addressed, not on a petition for rehearing, but on a group of appeals from judgments of the District Court following our supplemental judgment,[2] we deny the petition.

I

Appellants are workers allegedly injured while performing underground construction work on the subway system serving the District of Columbia and its environs. They filed negligence actions against WMATA and others, and in 1982, the District Court granted the defendant-appellees' motions for summary judgment.[3]

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[1] *Johnson* v. *Bechtel Assocs. Professional Corp.*, Civ. No. 82-2017 (D.C. Cir.) (Aug. 27, 1984) (unpublished order).

[2] *Keener* v. *Washington Metropolitan Area Transit Auth.*, No. 85-5029 (D.C. Cir. Sept. 2, 1986).

[3] *Johnson* v. *Bechtel Assocs. Professional Corp.*, 545 F.Supp. 783 (D.D.C. 1982), *rev'd*, 230 U.S.App.D.C. 297, 717 F.2d

On appeal, we vacated the judgments, holding, *inter alia*, that WMATA could not assert immunity under Section 905(a) of the Longshoremen's and Harbor Workers' Compensation Act.[4] In turn, the Supreme Court reversed, however, concluding that "WMATA [is] entitled to immunity from the tort actions brought by" appellants,[5] and remanded the case for further proceedings. In accordance with the Supreme Court's mandate, we entered the supplemental judgment to which the petition for rehearing relates, and directed the Clerk of this court to transmit a certified copy of the judgment to the District Court in lieu of a formal mandate.[6] On September 21, 1984, the District Court entered judgments for appellees.[7]

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574 (1983), *rev'd sub nom. Washington Metropolitan Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 104 S.Ct. 2827, 81 L.Ed.2d 768 (1984).

[4] 33 U.S.C. § 905(a) (1982); see *Johnson* v. *Bechtel Assocs. Professional Corp.*, *supra* note 3, 230 U.S.App.D.C. at 303-306, 717 F.2d at 580-583.

[5] *Washington Metropolitan Area Transit Auth.* v. *Johnson*, *supra* note 3, 467 U.S. at 940, 104 S.Ct. at 2836, 768 L.Ed.2d at 781.

[6] The pertinent parts of the supplemental judgment read:

> ORDERED by this Court that the Judgment of August 19, 1983 is vacated to the extent it reversed the grants of summary judgment by the District Court on the issues of immunity under § 905(a) of the Longshoremen's Act and it is
>
> FURTHER ORDERED by this Court that the judgments of the District Court on the issue of the immunity of WMATA under § 905(a) of the Longshoremen's Act be, and the same hereby are, affirmed.
>
> The Clerk is directed to transmit a certified copy of this Supplemental Judgment to the District Court in lieu of formal mandate.

Johnson v. *Bechtel Assocs. Professional Corp.*, *supra* note 1.

[7] *Johnson* v. *Bechtel Assocs. Professional Corp.*, Civ. No. 81-963 (D.D.C.) (Sept. 21, 1984).

On September 27, appellants filed in this court a petition for rehearing coupled with a suggestion of rehearing *en banc*. Their primary argument was made in anticipation of statutory amendments that were signed into law by the President the next day.[8] Appellants assert that the amendments legislatively overrule the Supreme Court's decision that WMATA enjoyed immunity, and urge this court to modify its supplemental judgment accordingly. They also claim that WMATA lacked immunity for another reason, which was not discussed by the Supreme Court.[9] We directed appellees to respond to these arguments.

On October 12, appellants noted separate appeals from the September 21 judgments of the District Court. These appeals are explicitly predicated upon a supposed denial by this panel of the relief requested by the petition for rehearing, and feature appellants' theory that the statutory amendments strip WMATA of immunity. The appeals have been briefed and argued orally, and are decided today.[10]

II

Appellants assert an "absolute right" to petition for rehearing of our supplemental judgment pursuant to Rule 40 of the Federal Rules of Appellate Procedure and our Local Rule 14. Appellate Rule 40(a) provides that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Local Rule 14(a)

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[8] See Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (codified at 33 U.S.C.A. §§ 904, 905 (West Supp. 1986)).

[9] Appellants contend that WMATA's immunity under 33 U.S.C. § 905 (1982) extends only to its common law torts, not to torts for which its charter assertedly made it liable. See generally D.C. Code Ann. § 1-2431 (1981).

[10] See note 2 *supra* and accompanying text.

specifies, relevantly to this case, that "[a] party that wishes to file a petition for rehearing . . . shall do so within 30 days after entry of judgment."

Appellants contend that the filing of their petition on September 27, 1984, was timely under our local rule.[11] That rule, however, does not control; rather, Appellate Rule 40(a), which permits shortening of the filing time for rehearing petitions "by order," is dispositive here. In our supplemental judgment, we directed the Clerk to transmit a certified copy of the judgment to the District Court, which he did on the same day, and that constituted the mandate of this court.[12] The time issuance of the mandate, like the time for petitioning for rehearing, may be shortened by order.[13] The clause of the supplemental judgment respecting the mandate was just such an order, and its effect was therefore to reduce to zero the period before issuance of the mandate, and necessarily the period for petitioning for rehearing.[14]

A court may order immediate issuance of the mandate when "satisfied (1) that [the] Court would not change its decision upon hearing, much less hear the case *en banc*, and (2) that there is no reasonable likelihood that

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[11] The petition for rehearing was filed 31 days after issuance of the supplemental judgment. Appellants attribute the one-day delay to misinformation from the clerk's office. The timeliness of the petition under the local rule is unimportant, however, since we hold that the rule itself is irrelevant.

[12] "A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue." Fed. R. App. P. 41(a). There was no opinion, and the parties were informed that costs would be determined at a later date.

[13] See *id.*

[14] Upon a showing of good cause, the mandate could, however, be recalled to permit the filing of a petition for rehearing. See Part III *infra*.

the Supreme Court would grant review." [15] Here, both requirements were met, for the course of action directed by the Supreme Court was very clear. Although it is our general practice in such a case specifically to order that the mandate be issued "forthwith," this omission from the supplemental order is of no consequence. We intended that the Clerk issue the mandate immediately, and he did so.

Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate,[16] and in the instant case the District Court regained authority to enter judgments for appellees. This authority was not compromised by the filing of the petition for rehearing in this court six days after the District Court had acted, for that court was free to exercise its jurisdiction absent a recall of the mandate.[17] Because the immediate issuance of the mandate precluded a petition for rehearing, appellants' sole alternative was a motion to recall the mandate.[18] Accepting that as appellants' evident intention, we treat their petition for rehearing also as a motion to recall the mandate.

III

Appellate courts have inherent power to recall a mandate upon a showing of good cause, but should exercise

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[15] *Ostrer* v. *United States*, 584 F.2d 594, 598 (2d Cir. 1978).

[16] *United States* v. *DiLapi*, 651 F.2d 140, 144 (2d Cir. 1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982).

[17] *Id.*

[18] See Part III *infra*. Mere consideration of such a motion does not impede the District Court's exercise of jurisdiction. See *United States* v. *DiLapi*, *supra* note 16, 651 F.2d at 144 n.2.

it only in exceptional circumstances.[19] If, after the mandate issues, the movant demonstrates good cause for failing to present an argument in a petition for rehearing, the court must then decide whether there are "special reasons" favoring recall.[20] But the recall power may not be used simply as a device for granting late rehearing; "[t]here must be an end to dispute." [21]

Because of the unusual procedural posture of this case, however, it is unnecessary to determine whether suitable reasons exist here. Our supplemental judgment returned this case to the District Court, and proceedings leading to new judgments were completed before appellants did anything further in this court. Moreover, appellants have had full opportunity to press their arguments on their appeals from those judgments.[22] Surely with the normal process of appeal available, resort to the extraordinary step of recalling the mandate is unjustifiable.[23]

In issuing the supplemental judgment, we were merely effectuating the will of the Supreme Court. To pave the way for presentation of their new arguments directly to this court, appellants might have asked the Supreme Court to recall its mandate, but they did not see fit to do

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[19] *Dilley* v. *Alexander*, 200 U.S.App.D.C. 354, 357, 627 F.2d 407, 410 (1980).

[20] See *Greater Boston Television Corp.* v. *FCC*, 149 U.S. App.D.C. 322, 331-334, 463 F.2d 268, 277-280 (1971), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972) (discussing possible justifications for recall of mandate); see also *United States* v. *Hubbard*, 222 U.S.App.D.C. 329, 330 n.4, 686 F.2d 955, 956 n.4 (1982).

[21] *Greater Boston Television Corp.* v. *FCC*, *supra* note 20, 149 U.S.App.D.C. at 332, 463 F.2d at 278 (quoting *Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965)).

[22] See note 2 *supra* and accompanying text.

[23] See *Mississippi Valley Barge Line Co.* v. *T. L. James & Co.*, 256 F.2d 344, 345 (5th Cir. 1958).

so. Recall of this court's mandate, on the other hand, not only would generate questions concerning our fealty to the Supreme Court's mandate,[24] but in the circumstances presented is inappropriate.

Without, then, reaching the merits of appellants' contentions, the petition for rehearing, treated both as such and as a motion to recall the mandate, is denied.[25]

So ordered.

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[24] See *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 178 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038, 19 L.Ed.2d 1151 (1968).

[25] This denial of the petition for rehearing is not an exercise of appellate jurisdiction that might interrupt our previous remand, the subsequent entry of judgments by the District Court, or the ensuing appeals in this case. See *United States* v. *DiLapi*, *supra* note 16, 651 F.2d at 144 n.2.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re	)	
	)	
METRO SUBWAY ACCIDENT	)	Misc. No. 82-306

SHOW CAUSE ORDER

Plaintiffs shall show cause in writing, on or before August 31, 1984, why WMATA should not be dismissed as a defendant in all filed cases, supporting its position with a detailed legal and factual explanation of their position.

WMATA shall respond on or before September 24, 1984.

There shall be no discovery in any of the pending cases awaiting resolution of this issue, which shall be assigned by the Chief Judge to another judge of this Court for determination.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

July 31, 1984.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re	)	
METRO SUBWAY ACCIDENT REFERRAL	)	Misc. No. 82-306
	)	

AFFIDAVIT OF ERNIE JORGENSEN

MONTGOMERY	)	
COUNTY,	)	ss:
MARYLAND	)	

I, Ernie Jorgensen being first duly sworn, depose and say that:

1. I am personally familiar with the construction of the Washington Metropolitan Area Transit Authority Rapid Rail System, and was employed from 1972-1976 as a safety superintendent for two of WMATA's prime contractors, P&Z-Shea, a joint venture, and Granite-Groves, a joint venture.

3. WMATA awarded prime contracts to P&Z-Shea and Granite-Groves, and these prime contractors, with which I was employed, had the contractual obligation to perform and supervise the performance of construction work pursuant to the contract's specifications. The contracts awarded to prime contractors were not subcontracts. WMATA supervised specification and safety compliance by the prime contractors through the Bechtel Corporation, but never directed or supervised actual work activities. In the event Bechtel found noncompliance with any contract specifications, the prime contractor was notified of this fact and was directed to comply. However, Bechtel never

directed the prime contractors how to comply or how to utilize the work force. The work site and the method of compliance with specifications were exclusively within the control of the prime contractors, not Bechtel or WMATA.

4. WMATA has never, to my knowledge, had either the work force or the equipment and tools necessary to construct any part of the subway system. WMATA has, to my knowledge, always awarded prime contracts to Authority prime contractors to perform the construction work.

5. WMATA is not a contractor as that term is used in the construction industry because it does not perform or have the ability to perform construction work, nor does it have the responsibility to direct or control the day to day work activities of the prime contractors to which it awards Authority Prime Contracts. The exclusive direction of the work force and day to day supervision of project construction rests in the hands of the Authority Prime Contractors. Furthermore, it is the prime contractors, and not WMATA, that exercise control over the work activities of the prime contractor's subcontractors on the workshite. WMATA has no contractual relationship with these subcontractors.

6. WMATA is owner of the project as that term is utilized in the construction industry, and the degree of supervision it exercises and the rights it retains are those of an owner. WMATA has the responsibility and the right to oversee compliance with the technical terms of Authority Prime Contracts, to direct the contractor to comply with time and budget constraints and and [sic] to see to it that work is performed safely. All public and private owners, in my expereince, have these rights and responsibilities, and exercise these rights and responsibilities, either them-

selves or through project engineers and/or project architects.

/s/ Ernie Jorgensen
Ernie Jorgensen

Subscribed and sworn to before me this 31st day of August, 1984.

/s/ Wilma T. Lockhart
Notary Public

My Commission Expires July 1, 1986

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE:	)	
	)	
METRO SUBWAY ACCIDENT	)	Misc. No.: 82-306
REFERRAL	)	Judge John H. Pratt
	)	

STATEMENT OF MATERIAL FACTS ABOUT WHICH THERE IS NO GENUINE ISSUE

Plaintiffs submit the following statement of material facts as to which there is no genuine issue:

1) WMATA is not a signatory of any contract which places upon it the responsibility for the performance of any construction activities on the Metro Construction Project.

2) WMATA is not now and never has been in the mining business or the tunneling business, and has never done any of the construction work on a construction project.

3) WMATA does not now and never has had the manpower or the tools and equipment necessary to building a subway system or any significant portion thereof.

4) The building of an underground rapid rail transit system is not the type of activity which is normally carried out by employees of WMATA or by any state agencies or transit authorities, but rather is the type work normally done by independent contractors.

5) WMATA has never been referred to, in any contract to which it is a party, as a contractor. WMATA has, how-

ever, been a party to contracts in which it is referred to as an owner.

6) None of the employers of any of the plaintiffs in these actions have ever entered into a contract with WMATA in which they are referred to as subcontractors.

7) WMATA does not now have and has never had the power or the responsibility to direct or control the methods or procedurs of the work operations in the building of the Metro system.

8) WMATA has never taken any affirmative steps to form a construction company.

Respectfully submitted,

ASHCRAFT & GEREL

/s/ William F. Mulroney
William F. Mulroney

/s/ Peter J. Vangsnes
Peter J. Vangsnes
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Plaintiffs

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In Re
METRO SUBWAY ACCIDENT REFERRAL : Mis. No. 82-306

ORDER

Upon consideration of the Motion for Summary Judgment filed on behalf of all of the defendant Metro Subway Construction contractors/subcontractors and of the Opposition thereto, and being advised that plaintiffs and said defendants concur with and stipulate to this Order, and the Court having considered the memoranda and exhibits submitted to this Court, it is this 4th day of September, 1984

ORDERED, that the Motion for Summary Judgment be, and the same hereby is, GRANTED, with respect to those cases listed in the attachment to this Order, and, it is further

ORDERED, that Judgments be, and hereby are, entered in favor of each of the defendants, except for the defendant, Washington Metropolitan Area Transit Authority, listed in Category I as set forth in plaintiffs' Opposition, which is attached hereto and incorporated herein by reference.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

cc: William F. Mulroney, Esq.
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036

Vincent H. Cohen, Esq.
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Robert L. Ellis, Esq.
10521 Judicial Drive
Suite 200
Fairfax, VA 22030

J. Joseph Barse, Esq.
1511 K Street, N.W.
Washington, D.C. 20005

Laurence T. Scott, Esq.
1314-19th Street, N.W.
Washington, D.C. 20036

F. Wainwright Barnes, Esq.
5454 Wisconsin Avenue, N.W.
Suite 1500
Chevy Chase, MD 20815

Pamela A. Bresnahan, Esq.
1120 Connecticut Ave., N.W.
Suite 1000
Washington, D.C. 20036

Edward J. Lopata, Esq.
David P. Durbin, Esq.
1030 Fiftteenth Street, N.W.
Suite 500
Washington, D.C. 20005

CATEGORY I

Plaintiff	C.A. No.
Robert Barner	82-3649
Vernon Bliss	83-3122
Ray Bright	83-2566
Charlie E. Brown	83-8277
Willie Ed Brown	84-0920
Clyde Burnett	84-0736
Matthew Carolan	83-2568
Everett Casey	83-0641
Roland Cheek	83-2006
John Clanagan	82-2559
James Coleman	83-2601
James Connor	84-0917
Alonzo Coward	82-3187
David Lee Davis	83-2550
Rufus Davis	83-1424
Charles D'Jossou	83-1129
Douglas Dragoo	82-3650
Steven Dragoo	83-3012
Lester Dumond	83-2171
Roosevelt Edmonds	84-0923
Edward Few	83-2542
Samuel Fleming	83-0594
Ernest Gilmore	82-3260
Ernest Gilmore	83-2549
Kenneth Haney	82-2666
Enoch Hanks	83-1727
John Hightower	83-0346
Ben Hudson	83-3000
Foster Huffman	84-0179
Walter Hughes	83-2849
Edward Hyatt	84-0919
Glade Jacobson	84-1526
Bragg Jones	84-0915
William Lawson	83-2613

Plaintiff	C.A. No.
Glen Lundberg	82-8159
George Lynch, Jr.	83-2848
James Lyons	84-1372
Vernon McAbier	83-2551
William McAbier	83-3290
Charles Maney	83-3120
Larry Mateer	83-3121
Robert Moody	83-2600
Walter Norberg	83-2128
Wayne Patro	84-0918
Robert Peterson	83-2851
Randolf Petty	82-3188
William Polk	83-1082
Willard Riley	83-1726
Herbert Robey	84-0916
Theodore Robinson	83-2850
Bobbie Earl Rogers	83-3659
John Savoy	83-2614
William R. Smith	83-2999
Paul Soots	84-8389
Gregory Soter	83-3010
Harold Suttles	84-0922
Dewey Thompson	83-3272
Luther Thompson	83-3291
Albert Vinchiarello	83-3292
Calvin Walker	82-2541
David Wallace	83-3011
George Welsh	83-3119
Kenneth Welsh	83-3123
Dennis Wilson	84-1529
Hershal Wilson	83-2569